

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 62528

JAMES C. ROGERS, PETITIONER,

vs.

MISSOURI PACIFIC RAIROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF MISSOURI

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PETITION FOR CERTIORARI FILED JANUARY 14, 1954

CERTIORARI GRANTED FEBRUARY 27, 1954

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[fol. 1]

**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,  
STATE OF MISSOURI**

PETITION—Filed May 27, 1953

Comes now plaintiff, James C. Rogers, and for his cause of action states to the Court:

1. That the jurisdiction of this Court is founded on the fact that this cause of action arises under the provisions of the Federal Employers' Liability Act (45 U.S.C.A., Sections 51-60).

2. That the defendant is now and at all times herein mentioned was the duly appointed, qualified acting trustee of the Missouri Pacific Railroad Company, a Corporation, under and by virtue of his appointment by order of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and was at all times hereinmentioned in charge of and operating all of the railroad properties, railroad system and lines, trains, engines and cars moved and operated by said Railroad Company, and in charge of the tracks, yards, and roadbeds over which said trains and cars were operated, and as such trustee of said railroad company, defendant was a common carrier of freight and passengers for hire, engaged in Interstate Commerce and transportation by railroad, and that said defendant now has, and at all times herein mentioned, had an office and place of business and is now [fol. 2] doing business in the City of St. Louis, State of Missouri.

3. That on the 17th day of July, 1951, and prior thereto, plaintiff was a servant in the employ of defendant in the capacity of a section gang laborer, earning approximately \$215.00 per month.

4. That a part of the plaintiff's duties was in furtherance of the Interstate Commerce Transportation business of the defendant and that by reason thereof, plaintiff and the defendant were at all times engaged in Interstate Commerce and then and there subject to the terms and provi-

sions of certain statutes of the United States of America, then and there in full force and effect, relating to the liability of Interstate Commerce carriers by railroad for injury to and death of their employees, which said statutes are commonly known as and referred to as the Federal Employers' Liability Act (45 U.S.C.A., sections 51-60).

5. That on the said 17th day of July, 1951 plaintiff, in the scope and course of his said employment for the defendant, was engaged in burning weeds using a hand torch along defendant's right-of-way, a short distance north of "Garner Crossing" in or near the City of Garner, State of Arkansas, and in so doing was required to work at a place in close proximity to defendant's railroad tracks, [fol. 3] whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and requiring plaintiff to move away from said danger; that on the occasion herein mentioned a train did pass and did cause plaintiff to thus retreat and move quickly from the place where he was then working and to use as his place of work a part of defendant's said right-of-way adjoining its tracks that was covered with loose and sloping gravel which did not provide adequate or sufficient footing for plaintiff to thus move or work under the circumstances. Plaintiff states that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid.

6. That as a direct and proximate result, in whole or in part, of the negligence and carelessness of the defendant, as aforesaid, plaintiff was caused to sustain serious and permanent injury and damages in the following respects, to-wit: plaintiff's back, spine and neck and the [fol. 4] bones, joints, muscles, tendons, ligaments, cartilages, discs, tissues, membranes, nerves and vessels thereof, were bruised, contused, wrenched, sprained, strained, ruptured, displaced and prolapsed; that plaintiff sustained a severe nervous shock and his nerves and nervous system



were severely shocked and injured; that plaintiff has suffered, is suffering and will in the future continue to suffer from mental anguish and great bodily pain and disability in all of the aforesaid parts and organs, as well as in his right hip, right leg and right foot; that all of said injuries and the effects thereof are serious, permanent, painful and disabling, and the function and use of all of said parts and organs, as well as plaintiff's ability to work, earn and enjoy himself, have been seriously and permanently impaired, weakened, diminished and destroyed; and that as a direct result of said injuries, plaintiff has lost all of his said earnings, and will in the future continue to lose all, or the greater portion thereof, on direct account of said injuries.

Wherefore, plaintiff prays judgment against the defendant in the sum of Eighty-five thousand (\$85,000.00) Dollars, together with his costs herein.

[fol. 5] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

ANSWER—Filed June 26, 1953

Comes now the defendant, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, and for his answer to plaintiff's petition filed herein and to the various paragraphs thereof, in order, states the following, to-wit:

1. He admits the allegations contained in paragraph numbered 1 of plaintiff's petition.

2. He admits the allegations contained in paragraph numbered 2 of plaintiff's petition.

3. He admits that on the 17 day of July, 1951 and prior thereto plaintiff was employed by defendant in the capacity of a section gang laborer, but denies each and every other allegation contained in paragraph numbered 3 of plaintiff's petition.

4. He admits the allegations contained in paragraph numbered 4 of plaintiff's petition.

5. He denies the allegations contained in paragraph numbered 5 of plaintiff's petition.

6. He denies the allegations contained in paragraph numbered 6 of plaintiff's petition.

Further answering, defendant states that if plaintiff was injured on the occasion mentioned in his petition, which [fol. 6] defendant denies, his injuries were directly caused or contributed to by plaintiff's own carelessness and negligence in the following respects, to-wit:

A. He negligently and carelessly failed to keep a look-out ahead and laterally in the direction in which he was walking.

B. He negligently and carelessly failed to maintain and to secure proper footing for himself in the circumstances under which he was working and performing his duties at the time and place mentioned in plaintiff's petition.

C. He negligently and carelessly walked backwards or sideways without looking in the direction in which he was walking and without ascertaining for himself for his own safety that it was secure footing in the direction in which he was stepping or walking.

D. Plaintiff further states that the accident causing the plaintiff's injuries, if any, was the result of a negligent and careless misstep, slip and inattention on the part of plaintiff, and plaintiff was familiar with and knew the conditions under which he was required to work and the necessary structure of the ground upon which he was working, and failed to take proper care and precaution to protect himself from slipping or falling and failed to take proper care and [fol. 7] precaution for his own safety to obtain proper footing, both in standing and in walking in all directions and while in the performance of his duty.

Wherefore, having fully answered, defendant prays to be dismissed with his costs.

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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

**Trial**

The above entitled cause came on for trial on the 12th day of April, 1954, before the Honorable F. E. Williams,

Judge of the Circuit Court of the City of St. Louis, State of Missouri, presiding in Division thereof, sitting with a jury, and the following proceedings were then and there had:

#### APPEARANCES

Mark D. Eagleton, Esq., for Plaintiff.

Don B. Sommers, Esq., for Defendant.

A jury was duly empaneled and sworn to try the cause.

Mr. Eagleton made an opening statement on behalf of [fol. 8] the plaintiff.

Mr. Sommers made an opening statement on behalf of the defendant.

#### Plaintiff's Evidence

The plaintiff offered and introduced the following evidence:

JAMES C. ROGERS, of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Eagleton:

Q. Mr. Rogers, when you answer questions speak out as clearly as you can. Keep your voice up, because all the jurors must hear you, the court reporter, the Court and counsel. If for any reason you don't understand the question, indicate that and we will repeat it. What is your name?

A. James C. Rogers.

Q. Keep your voice up. How old are you?

A. Twenty-seven.

Q. Where do you live?

A. McRae, Arkansas.

[fol. 9] Q. Married man?

A. Yes, sir.

Q. You have one child, I believe?

A. Yes, sir.

Q. How long have you lived in McRae, Arkansas, or in that area?

A. I have lived there all my life with the exception of nine months I was in Michigan.

Q. Now, on July 17, 1951, I believe you were in the employ of the Missouri Pacific Railroad Company, being operated by its trustee, Mr. Thompson, on that day, were you?

A. Yes, sir.

Q. And had been employed by the company for some months previous to that?

A. Yes.

Q. In what capacity were you employed?

A. As section laborer.

Q. Who was your foreman?

A. Mr. Howdershell.

Q. Do you know how to spell his name?

A. H-o-w-d-e-r-s-h-e-l-l.

Q. Was he the same foreman you worked under all the time?

A. Yes.

Q. Were you in a section gang on July 17, 1951, at the [fol. 10] time your injury occurred?

A. Yes, sir.

Q. What time of the day did the accident happen?

A. Approximately eleven o'clock a.m.

Q. That is in the day time?

A. Yes.

Q. What type of day was it insofar as being clear or dry?

A. It was clear.

Q. Whereabouts were you working at the time?

A. I was working, well, at Garner, Arkansas, is where I started.

Q. Garner, Arkansas?

A. Yes.

Q. What particular work had been outlined to you by your foreman that morning before you were hurt? What were you doing?

A. I was firing weeds and vegetation on the shoulder of the road.

Q. Were any instructions given to you by him as to how far north you would go before you turned and went south?



A. Yes, sir; down as far as the section hands were putting in ties.

[fol. 11] Q. Is there a railroad crossing, a road crossing there at Garner?

A. Yes.

Q. At the time you were injured about how far north of that crossing were you?

A. Approximately two or two hundred fifty yards north from the crossing.

Q. North of the crossing?

A. Yes.

Q. Which way did your railroad tracks run?

A. North and south.

Q. How many tracks were there?

A. Two.

Q. Those tracks were commonly known as northbound and southbound mains. Is that right?

A. Yes, sir.

Q. There were no more; just the two tracks?

A. Yes. There was south of the crossing; starting a little bit north of the crossing and extending back south there is a spur track.

Q. Up where you were there were only two tracks?

A. Yes, sir.

Q. Is there a culvert located some short distance away from the point where you were injured?

[fol. 12] A. No, sir. It was at the place I was injured.

Q. It was at the place you were injured. This culvert that is there, how far is it away from this crossing, your crossing tracks?

A. It is approximately two hundred and fifty to three hundred yards.

Q. The crossing I am speaking of would be the crossing that runs in which direction?

A. East and west.

Q. Is that a public crossing?

A. Yes, sir.

Q. A grade crossing?

A. Yes, sir.

Q. That morning when you started to work at what time did you start work?

A. Started work at seven o'clock.

Q. You had been working approximately four hours?

A. Not at this place. We stopped between McRae and Garner and put in some ties, three or four or five ties—I don't remember—but a few ties that morning before we came down to this point.

Q. About what time was it when you got down to Garner?

A. I would say it was approximately ten-thirty.

Q. So you had only been at this place about a half an [fol. 13] hour before you got hurt?

A. Yes.

Q. What had you done in that half hour's time with reference to burning these weeds?

A. I had to move from the crossing north towards the culvert. I was firing the south main shoulder.

Q. You were firing the shoulder on the south main?

A. Yes, sir.

Q. That would be the shoulder that would be immediately west—

A. Yes.

Q. —of the west shoulder of the southbound track?

A. Yes, sir.

Q. And that shoulder there was about how wide?

A. Well, it was approximately three or three and a half feet wide.

Q. Was there, all during that distance as you came north from the Garner crossing, that is that east and west crossing, a flat surface upon which to walk?

Mr. Sommers: I object to further leading of the witness, your Honor. We have gone through the preliminaries on the thing. I think now the questions ought to be direct.

[fol. 14] The Court: All right. Make your questions more direct.

By Mr. Eagleton:

Q. As you came north firing these weeds, as you speak of it, on the west side, about how far would your body be, as you were moving north doing that work, away from the, we will say, the west edge of the ties which were underneath the southbound main?

A. I would be approximately two and a half or three feet.

Q. What was the surface, how was it composed, as you came along there with reference to whether it was flat or not flat or whatever the situation was?

A. It was flat.

Q. So that you had a flat surface to move north from the crossing. Is that right?

A. Yes, sir.

Q. Now, what sort of a device did you have to assist in igniting or burning or firing, as you call it, these weeds and vegetation?

A. I had a quart container with two spouts on it; one opposite right where you fill it up. On this container one spout had about a three-foot handle on one end of it; it runs back at about a forty-five degree angle. Opposite from that was the spout that had wicks on it, rags and stuff, [fol. 15] that made, you know, it was a flame where you light it. You light this and it has no pressure in it; it just flames and you stick it to the weeds.

Q. Did you use the word "quart"? Was it a quart container?

A. Yes.

Q. What was the container made of?

A. Tin.

Q. What was it filled with? A quart of what?

A. It was kerosene and gasoline—white gasoline mix that we used in the motorcar.

Q. Then had you ever done that work before at any time?

A. No, sir.

Q. Had you ever seen anybody attempt to fire weeds or vegetation with that sort of a device before?

A. No, sir.

Q. Normally and ordinarily how are the weeds fired or ignited?

A. They have a regular machine. It is a thing that has an engine on it; it pulls it by its own strength. It has irons that lead out on it. This fuel has pressure. They call them flame-throwers which does the shoulder burning.

Q. That is the way it was normally done?

A. Yes.

[fol. 16] Q. In that way tell the jury where the flame would be with reference to the men working with it. Would it always be behind or ahead or what?

A. It is more or less like the engine of a train. The man that operates it sits in there, you know, like an engineer and the fireman. The flame devices are on the back of it. The flame all comes out of the back of the machine. They are approximately fifteen or twenty yards ahead of the flame.

Q. The men are?

A. Yes.

Q. So the men in that position are never injured by the flames?

A. No, sir.

Q. On this particular occasion with this device, who gave you that device to work with?

A. The foreman, Mr. Howdershell.

Q. When did he give it to you? How long before this accident?

A. When we got off at Garner Crossing, when he told me to get off approximately thirty or forty-five minutes before I was hurt.

Q. Ordinarily what is that particular device used for, that particular hand device used for?

A. All I ever saw it used for was for burning a square, [fol. 17] but a surface to where when they unload these creosote cross ties, burn all the weeds and grass out so if there is any vegetation—these creosote ties catch fire easily, and they don't burn them up; they burn this spot out. That is away from the track.

Q. It is away from the tracks?

A. Yes.

Q. You never saw it used up near the tracks?

A. No, sir.

Q. When he gave you this device did he give you any instructions, orders or directions as to what he wanted you to do, how he wanted you to do it?

A. All he said, "Fire down around the path." In other words, there was a path that went over the two tracks. He said, "Fire down around on the west side and cross over on the east side and fire back to the crossing."



Q. Where would that path that crossed over be, from the west to the east side, with reference to this culvert?

A. It is approximately two hundred yards on further north than the culvert.

Q. Two hundred yards further north from the culvert?

A. Yes.

Q. The culvert we are talking about and the only one [fol. 18] we are talking about is the one where you were injured north of Garner crossing?

A. Yes.

Q. So that all the work you did up until the time you were injured was on the west side?

A. Yes.

Q. All of the work was proceeding in what direction?

A. North.

Q. Now, while you were doing that work how far had you gotten either way from the crossing, the Garner crossing—or how close had you gotten to the culvert before you heard any train coming?

A. I was approximately thirty or thirty-five yards from the culvert.

Q. From the culvert?

A. Yes.

Q. Which way were you from the culvert?

A. I was south of the culvert.

Q. So that you would have to go, to get to the culvert, just by way of making it clear, that much further to the north, thirty or thirty-five yards north to get to the culvert?

A. Yes.

Q. Which way was the train coming?

A. It came from the south going north on the east tracks.  
[fol. 19] Q. On the east track, which would be the north-bound track?

A. Yes.

Q. The track nearest to you would be the track farthest to the west—that is, the southbound track?

A. Yes, sir.

Q. How much space is there, approximately, if you recall, between the set of tracks?

A. Well, there is approximately, between the end of the ties there is approximately three feet.

Q. I am talking about between the two sets of tracks?

A. The two sets of tracks? There is approximately four feet or four and a half feet between them, the first two rails; I mean the two inside rails.

Q. Yes. Are we talking about the same thing? I want to know the distance between the northbound track, the two rails of the northbound track and the two rails of the southbound track.

A. Yes, sir. There is two rails to each track, what is called a "track". In the center, from one rail to the other, the two center rails, there is approximately four and a half feet distance between the two inside rails.

Q. There would probably have to be more than that for [fol. 20] cars to run on them?

A. No, sir. I am talking about from the end of the ties, Mr. Eagleton. I mean from the end of the ties the rails are setting on.

Q. Between the two ends of the ties there would be four and a half feet or some distance of that kind?

A. Yes.

Q. They were both set up at the same level, the tracks?

A. Yes.

Q. Were the tracks as far as the eye is concerned, practically level at that place?

A. Yes, sir. Coming from the north—I mean from south going north there was a little decline from the crossing or from south of the crossing towards the north it is lower as it goes down for a way. It is kind of downgrade.

Q. Did you receive any instructions from Mr. Howdershell, your foreman, as to what you should do at all times while a section man with reference to trains that go by?

A. Yes, sir.

Q. As to what duties you were to perform, what were you told to do by him?

A. He told us to put down everything we were doing, get clear of what we were doing and stand and watch the trains [fol. 21] go by for hot boxes.

Q. Had you always done that during the time you worked there as a section man?

A. Yes.

Q. What were you told by him, if anything, with reference to standing on the opposite track in doing that?

A. He said at all times he wanted some of men on one side of the track and some on the other.

Q. Some on one side and some on the other?

A. Yes.

Q. So they could see journals as they went by, hot boxes?

A. Yes, sir.

Q. With reference to standing on the track, between the rails of the track, what did he tell you about not doing that or doing that?

A. He said, "Don't stand even on the end of the ties or close to the other rail while there is a train on the opposite rail, because the interference, the sound of one train would deaden the sound of another one that possibly would come from the other way.

Q. He told you never to stand on that sort of track?

A. Yes. He said, "Always stand on the shoulder."

Q. Now, when you were doing this work on the west side [fol. 22] of the southbound main and moving from south to north with your torch igniting these weeds, you say you had gotten to a point about thirty or thirty-five yards away from the culvert to the north of you. Where were you standing then? Standing on the shoulder?

A. Yes, sir.

Q. And what was the first notice that you got of the fact that a train was coming?

A. When the train blew for the Garner crossing.

Q. How did you get that notice? I mean how did you learn of the fact?

A. I heard the whistle blown.

Q. Had you at any time prior to that been given any notification that the train would come or when it would come?

A. No, sir.

Q. What did you do when you heard this train whistle and knew it was coming to the north?

A. Well, I looked to see which track it was on.

Q. What did you see?

A. I saw that it was on the northbound rails, going north, so I quit firing. I ran on up about thirty or thirty-five

yards. When I came to about this point the engine had [fol. 23] passed me.

Q. The engine was at what end of the train? The north end of the train?

A. Yes; was at the north end of the train.

Q. Go ahead.

A. At the time I thought I was far enough away, that I was plenty far enough to clear myself of the fire or any danger of the fire and it was time to start to watch these journals. So I set my torch down on the end of the tie, and was standing out on the flat surface, watching the train go by. After the train had gotten approximately half or two-thirds of the way back, I felt this heat on my face, on the side of my face. I turned to see what had happened, and it was fire right up in my face. I threw my left arm over my face and started turning to the west, to the north, backing away rapidly from the fire, and that is when I walked in on this culvert and slipped and fell.

Q. When you got on the culvert how far did you have to move while getting away from the flames and this fire which was in your face? How far did you have to move to get to this place where you slipped and fell?

A. Approximately six or eight feet.

Q. What direction would that be?

[fol. 24] A. That would be north from where I was standing.

Q. Where did that put you with reference to the culvert?

A. Up on the culvert.

Q. Was there any flat surface there at that time, of the culvert, for you to walk on?

A. No, sir.

Q. Are culverts a very frequent and, necessarily, a plentiful thing around railroads? You saw a lot of them?

A. Yes.

Q. In section work?

A. Yes.

Q. I will ask you what is the fact, normally do they have a flat surface upon which to walk across a culvert?

A. Yes, sir, they do.

Q. Did this one have one? Or was it one that was there and buried or covered up?



A. Apparently it had one, but they had neglected it, and the vibration from the train had shaken this incline—

Mr. Sommers: I am going to object to what he is assuming happened, your Honor.

The Court: Yes. Objection sustained.

By Mr. Eagleton:

Q. I don't want you to assume anything. When you [fol. 25] stepped on that portion of it, what was the effect it had on your feet—on that portion of the culvert where normally it is flat?

A. Nothing but crushed rock; no flat surface. It rolled out from under me.

Q. Is that what caused you to fall?

A. Yes.

Q. When you fell what did you fall on? How did you fall?

A. My feet slipped out from under me. I fell in kind of a jack knife position.

[fol. 26] Q. Normally when you were working there on the section crew and a train was to come by what would the foreman do with reference to notification as to time and so forth?

A. Yes, sir. He would tell us to work; he called the trains. We would work; we paid no attention to trains whatsoever. He said that was his job; we would work until he called "train". He would tell us, "There is one on north main", or "One on south main," and then we would work until he said, "Clear the track," or whatever we were doing, and some of us would take one shoulder and some the others. There was always someone on both sides watching the train go by.

Q. You say on this occasion you were not notified by anyone before you heard this whistle of the train yourself?

A. No, sir.

Q. Were you notified even afterwards?

A. No, sir.

[fol. 27] Q. When you heard the whistle and trotted this distance to the north and set your can down, you set it down where with reference to the shoulder or the ties?

A. I set it on the end of the ties.

Q. Where were your feet at that time with reference to the flat surface there? Were you on an incline or was it flat or were you up on the track or where were you?

A. I was standing on a flat surface with my torch setting on the end of the ties.

Q. Your torch would be which way from you? A little east?

A. It would be east of me, yes; northeast of me.

Q. It had a three-foot handle?

A. Yes.

Q. Did these weeds you were speaking about, which you were igniting, did they come all the way up to where you were standing and even to the back of you, to the west of you?

Mr. Sommers: I object to that question as being leading and suggestive.

The Court: I will sustain the objection.

Q. Will you tell me about the weeds that were there with [fols. 28-55] reference to where you were standing with this torch? Were there any weeds to the south of you?

A. Yes, sir.

Q. Were there weeds to the west of you?

A. Yes, sir.

Q. Were there weeds right up to this culvert?

A. Yes, sir.

Q. When these flames enveloped you, you say you turned around. Where was the flame, how close was it to your face when you turned and became conscious of the heat? How close was it to your face when you turned around?

A. It was right in my face; even singed my hair a little and my eyelashes.

Q. Where were the other men, the other members of the crew, working with reference to where you were then standing at that time?

A. They were approximately a hundred or a hundred and fifty yards further north, working on the east track.

[fol. 56] Cross-examination.

By Mr. Sommers:

Q. You mean you have never seen men firing a right-of-way by a handblower before?

A. No, sir.

Q. Never saw that in your life?

A. No.

Q. This torch just happened to be there for the purpose of burning off creosote ties?

A. No, sir. I don't know how it come to be there. It was on the motorcar.

Q. Did you say anything to Mr. Howdershell when he asked you to fire out there?

A. No, sir.

Q. Didn't say anything to the effect, "How about getting that machine down here?"

A. No, sir.

Q. Did you tell him you didn't know how to fire a right-of-way?

A. No, sir.

Q. You just went on ahead and did it?

[fol. 57] A. Yes, sir.

Q. You didn't say anything about there being a better way that morning? You just left it to him at the time?

A. No, sir; I done what I was told to.

Q. Didn't even ask him about it?

A. No, sir.

Q. Which way had you come to the job? From the south or from the north?

A. From the south.

Q. You got off where? Garner Crossing?

A. Yes.

Q. The other men were on up the way?

A. Yes.

Q. You were going to fire from Garner Crossing up to them?

A. Yes.

Q. You had been firing for about half an hour?

A. Yes, sir.

Q. With this torch?

A. Yes.

Q. You were getting along all right, were you?

A. Yes.

Q. You hadn't had any trouble firing along?

A. It was slow. At the crossing there was small bunches of grass that weren't very high; didn't burn very rapidly. [fol. 58] Q. You have to go from patch to patch to do your firings?

A. Just spots.

Q. You fire all the way up on the dump and down, don't you?

A. No, sir. They spray this with a chemical.

Q. What were you doing on that day, I am talking about?

A. I was firing where it had been spray. I mean they wouldn't burn only where they had been sprayed. I was firing weeds that had been sprayed, that were dead.

Q. They spray it with weed killer and you come along and burn those weeds off?

A. I did that day.

Q. That is all down in the dump, from the ties down to the top of the dump, isn't it?

A. No, sir. It don't hardly extend that far.

Q. How far does it extend?

A. It extends just over the shoulder, just over the incline a little bit, not too much, of the dirt dump.

Q. You mean to say you just burn from this path that you described, between the ties and that path? There is [fol. 59] gravel there, isn't there?

A. No, sir.

Q. There is not?

A. No.

Q. Where is the path?

A. It is between the shoulder, the corner of the road and the incline, where it starts, is a flat surface of dirt. Then there is an incline from there up to the end of the ties.

Q. What is that incline?

A. It is crushed rock.

Q. I think we are together there. We are using different words. So, from your right, as you would walk north there was crushed rock?

A. Yes.

Q. To your left the dump went down. Is that right?

A. Yes, but from the end of the crushed rock over to the dump there was three or four foot of flat surface there.

Q. The crushed rock is on top of the dump, isn't it?

A. Yes.

Q. On top of the crushed rock there are the ties?

A. Yes.

Q. And then you say there is this path next to the crushed rock?

A. Yes, sir.

[fol. 60] Q. And then to the left, if you were walking north, the dump goes down hill, doesn't it?

A. Yes.

Q. Is it downhill?

A. Yes.

Q. Where were you burning?

A. I was burning from the end of the ties, I mean from the end of the incline. The creosote that runs out of the ties keeps the weeds from growing there, from about half—

Q. Just a minute. If you are facing north, you have got on your right the crushed rock and the ties?

A. Yes.

Q. You are standing in this walkway, you say is there and you are burning off to the left, aren't you?

A. Yes.

Q. Don't you have to burn all the way down to the dump?

A. Not all the way, no, sir.

Q. How far an area from this path do you burn?

A. Approximately two and a half or three feet.

Q. You are burning a place about that wide, is all you are burning?

A. Well, where this spray extends over this dump and falls down on those lower weeds it does burn it down to the surface; I mean from the dump down it does, where [fol. 61] the chemical did get on the weeds it does burn off down the dump.

Q. By the way: when you stand up there you can turn and look up and down the track. You are that high, aren't you?

A. Yes.

Q. You heard this whistle blow. Is that right?

A. Yes.

Q. You looked, turned and looked south and saw the train coming?

A. Yes.

Q. With that you left your burning and went, ran thirty or forty yards ahead. Is that right?



A. Yes.

Q. You were already up on the dump then; you didn't have to climb the dump at that time?

A. No, sir. I was on the dump at all times.

Q. Up on top. So that train didn't take you by surprise, did it? You heard it coming?

A. Yes, sir, when it blew for the crossing.

Q. What is that?

A. When it blew for the crossing.

Q. You had time thereafter to go thirty or forty yards?

A. Yes.

Q. Ninety or a hundred feet?

A. Yes.

[fol. 62] Q. About twice the length of this courtroom?

A. Hardly that far.

Q. Well, it was about ninety or a hundred feet?

A. Yes.

Q. Whether it is twice the length of this courtroom or not. By the time you got to that point thirty or forty yards north of you, the engine was then passing you. Is that right?

A. Yes, sir; it had passed.

Q. So the fact Mr. Howdershell did not tell you this particular train was coming by didn't cause you any surprise, did it?

A. No, sir.

Q. All right. So far as that element of the case is concerned, you knew it was coming just as if Mr. Howdershell had told you?

A. Not as soon I wouldn't have, because he calls them when they come in sight.

Q. When they come in sight?

A. Yes.

Q. As far as this accident is concerned you had plenty of time thereafter before the train got to you?

A. Yes.

[fol. 63] Q. You went up to a point right next to the culvert, didn't you?

A. Yes.

Q. When you went up there you were thirty or forty yards away from the fire?

A. Yes.

Q. You could see the culvert?

A. Yes.

Q. You knew it was there?

A. Yes.

Q. You knew you were standing right next to that culvert?

A. Yes.

Q. There wasn't any trouble with that angle of it?

A. No, sir.

Q. As you stood there you watched the train go by?

A. Yes, sir.

Q. You felt some heat on your face?

A. Yes.

Q. You say you turned to the right. Is that right?

A. Yes.

Q. You had been facing east?

A. Yes, sir.

Q. You turned to the right and saw this fire?

A. Yes, sir.

Q. You say it was right up in your face?

A. Yes.

[fol. 64] Q. Did you ever tell anyone before today that your face was burned or your hair was singed or your eyebrows were singed, besides Mr. Eagleton, I mean?

A. I don't know as I told anyone, no.

Q. You never told me when I took your deposition.

Mr. Eagleton: You didn't ask him.

A. You didn't ask me.

By Mr. Sommers:

Q. I asked you what happened out there, didn't I?

A. I answered it the best I could. Your Honor, can I stand up a minute?

The Court: What?

The Witness: May I stand up just a minute?

(At this point the witness rose from his chair.)

By Mr. Sommers:

Q. I will ask you if when your deposition was taken, on page 31 Mr. Eagleton asked you this question: "Well, tell him what the thing"—are you listening?

The Court: He requested permission to stand for a moment.

The Witness: Thank you, sir.

Q. (By Mr. Sommers) (Reading)

"Q. Tell him what the thing is, tell him what you were [fol. 65] doing, the way you got there and how you got there."

That was Mr. Eagleton's question to you.

"A. All right. When this train came I heard the whistle blown, blow for the crossing. I stopped to see which way the train was, on which track it was on. It was on the north main going north. Well, I stopped firing and trotted out of the fire approximately thirty yards to get out of the danger of the fire. I stopped and set this torch up on the end of a tie where I wouldn't even catch anything else on first, and watched the train for hot boxes, and the next thing I knew—I mean the first thing I knew that hit me was the heat. The wind from this train blew this fire and these high weeds down on me. And that is just the way it happened."

"Q. What did you do when you felt the heat?" Mr. Eagleton asked you. "What did you do then when you felt the heat?"

"A. That's right.

"Q. What did you do?"

"A. I threw my hand up over my face like this and [fol. 66] started turning and getting away from it."

You didn't say anything even when Mr. Eagleton asked you, about the fire sing-ing your face?

Mr. Eagleton: He is telling what he did.

Mr. Sommers: Mr. Eagleton, you had your chance. Just give me mine.

The Court: One at a time.

By Mr. Sommers:

Q. You didn't say anything about it at that time, did you?

A. No, sir.

Q. Did you ever say anything about it to any of your doctors?

A. Not that I remember.

Q. So until today you have never before mentioned the fact that the——

A. (Interrupting) I could have mentioned it. I don't say I didn't.

Q. Do you recall, Mr. Rogers, at any time prior to today that you have told the section crew, your doctors or anyone else, me included, that the fire singed your eyebrows and your hair?

A. Well, you said "anyone else". My wife noticed it when I came in, when I came to the house. The best I recall, I don't remember for sure, but I believe Dr. Kinley [fol. 67] mentioned it and asked Mr. Howdershell what I was doing. He told him that I was firing and that is how come it, but I won't say for sure.

Q. Was Mr. Howdershell there with you in Dr. Kinley's office?

A. Yes.

Q. Then he would know about it?

A. Yes.

Q. Now, when the heat hit your face there you threw your arm up over your eyes like this?

A. Yes.

Q. You walked backwards, didn't you?

A. I turned to the south, to the west and to the north. I mean I was turning to the south, west and north as I was rapidly moving away.

Q. Well, you did walk backwards?

A. Yes, sir. I was walking backwards——

Q. You walked about three or four steps backwards?

A. Yes.

Q. All that time you had your hand over your face?

A. Yes.

Q. You knew at the time that you were going to walk across this gravel incline there?

A. No, sir. I had forgotten about it at that time.

[fol. 68] Q. Oh, you forgot about everything?

A. Yes.

Q. Did you even look to see where you were walking at that time?

A. No, sir. My face was full of smoke and everything; I just couldn't see at the time.

Q. When you slipped, you say the gravel slipped out from underneath you?

A. Yes.

Q. This is that portion of the gravel that is right up next to the ties, isn't it?

A. Yes, sir.

Q. There is gravel right up next to those ties everywhere along the railroad, isn't there?

A. Yes, sir.

Q. That is the proper way, I believe, that a railroad is built so far as you know, isn't it?

A. Yes.

Q. You have a dump and on top of that you put this gravel?

A. Yes, sir.

Q. They call it "ballast, don't they?

A. Yes.

Q. On top of that you lay the ties?

A. Yes.

[fols. 69-77] Q. And the rails. It was that ballast you were walking on at the time you slipped?

A. Yes.

Q. It was that ballast that slipped from under your feet, wasn't it?

A. Yes.

Q. When you slipped you fell to your buttocks, didn't you?

A. Yes, sir.

Q. Did I understand you awhile ago to say that you fell in a jack knife position?

A. Yes.

Q. Let me ask you this, Mr. Rogers: wasn't today the first time you ever told anyone in your life you fell in a jack knife position?

A. No, sir.

[fol. 78] By Mr. Sommers:

Q. Now, Mr. Rogers, to go back again: you say there is, alongside of the right-of-way, a path?



A. Yes, sir.

Q. And that path, what is the purpose of it?

A. It is a flat surface to walk on.

Q. And is it kept for that specific purpose?

A. Well, sir, that is what we use it for, what I used it for when I was working there.

Q. Who keeps it there?

A. Well the section gang; the railroad company.

Q. You were part of that section gang, were you?

A. Yes, sir.

Q. You say the section gang keeps a path there for themselves to walk on?

[fol. 79] A. It is there, yes, sir.

Q. On both sides of the right-of-way?

A. Yes, that's right.

Q. Every place on the railroad you have been?

A. No, sir, not every place.

Q. Well, all along the right-of-way on that section you worked on?

A. Yes; there is a flat surface of dirt other than where the culverts are.

Q. Other than where the culverts are?

A. Yes.

Q. So anytime you come to a culvert there isn't any. Is that right?

A. There is not a dirt, flat surface.

Q. At any culvert?

A. To a certain extent; I mean not like a shoulder is.

Q. That condition prevails throughout your entire section?

A. Yes, sir.

Q. This machine you said you had seen firing the right-of-way; I take it you are directing your testimony to the period of time in which you worked for the railroad. Is that right?

[fol. 80] A. No, sir. They didn't fire it while I was working with the flame throwers.

Q. You, in your experience on the railroad, have never seen them work with a flame thrower?

A. Not while I was working on the railroad, no, sir.

Q. So you don't know whether that thing was in use at that time or not, do you?

A. Pardon?

Q. You don't know whether that machine was in use at that time or not, do you?

A. I heard Mr. Howdershell say, the foreman—

Q. I am asking you if you know whether or not that machine was in use during the time you were on the railroad, or not?

A. No, sir, I don't know that it was in use.

Q. What kind of a machine did they use to kill these weeds with?

A. I don't know that. They spray it with some kind of a machine, some chemical that kills it, but I don't know what kind.

Q. Did you see them do it?

A. No, sir, I didn't.

Q. You have lived down there near McRae or there— [fols. 81-83] abouts all your life?

A. Yes.

Q. You have never seen any section crew firing with a handtorch?

A. No, sir.

Q. In your whole life?

A. No, sir.

Q. At the time you were firing along there what were the other men doing?

A. They were putting in ties on north main.

Q. That is heavy work, isn't it?

A. Yes.

Q. Why was it you were just firing while the others were doing the heavy work up there?

A. Because Mr. Howdershell assigned me to that job.

[fol. 84] Q. By the way: Generally when they do any burn-out there they burn the whole right-of-way, don't they?

A. Yes, sir; with those flame throwers that I have seen go through, do burn the whole right-of-way.

Q. How about during the time you worked there? You don't know when the flame throwers were there, do you?

A. No, sir.

Q. That is something a long distance past, isn't it?

A. They had sprayed the weeds for the flame thrower. If they wait a week or so after it is sprayed—

Q. Do you know of your own knowledge whether they sprayed it for the flame thrower or for something else?

A. All I know is what Mr. Howdershell said.

Q. I am talking about what you know.

A. No, sir; definitely I don't know.

Q. As far as this flame thrower, that is something that happened long before you ever came on the railroad. Is that right?

A. Yes, sir.

Q. So what they used at the time you were on the railroad was not the same as what was long before. Is that right?

A. That's right.

[fol. 85] Q. All right. Do you know what the section crew's duties were when the flame thrower was used?

A. No, sir.

Q. You don't know what the section crew's duties were when the flame throwers were used?

A. No.

Q. So, actually, when you say positively to Mr. Eagleton that the flame thrower was the way they always did it down there, you don't have any actual knowledge of that at all, do you?

A. Well, sir, that is what I have seen them do it with.

Q. You have just driven along and have seen the flame thrower out there on the highway?

A. Yes. I have stood and watched it pass through town.

Q. That was long before you went to work for the railroad?

A. Yes, sir.

Q. So far as the part the section crew took in that, you have no idea at all, do you?

A. No, sir.

Q. You were not on this particular day, the 17th of July, burning the whole right-of-way, were you?

A. I was burning the part of it that was sprayed, that [fol. 86] was dead, that would burn, yes, sir.

Q. You were just burning off the shoulder, weren't you?

A. Yes.

Q. Right up next to the ballast?

A. Yes, sir.

Q. You were only burning a place about this wide, weren't you (indicating)?

A. Approximately four or five feet wide, yes, sir.

Q. That would be dead grass and weeds that would catch fire from your torch?

A. Yes.

Q. You didn't have the whole right-of-way on fire, or anything like that?

A. No, sir.

Q. Now, Mr. Rogers, when you heard this train coming you looked and saw which way it was going, didn't you?

A. Yes, sir.

Q. You knew it was a northbound train?

A. Yes.

Q. You knew that there is wind that comes along after a train?

A. Yes, sir.

Q. You got ahead of that fire, didn't you?

A. Yes, sir.

Q. Why didn't you get behind your fire so the wind would pull it away from you?

A. I would have been standing in the fire. There was [fol. 87] fire on the shoulder all south of me.

Q. You didn't put the fire out as you went along there?

A. I set fire to the grass. I didn't put it out.

Q. You just let it burn?

A. Yes; I was in front of the fire.

Q. You kept in front of it all the way?

A. Yes.

Q. You knew when this train come along it was going to blow that fire, didn't you?

A. Sir?

Q. You knew when the train came along it was going to pass up that fire?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. You knew there would be a wind come along behind the train, though?

A. Yes.

Q. It would go along in the direction of the train?

A. Yes, but by being a track between me I didn't think the wind would affect it too much.

Q. You say it is only four and a half feet between those tracks?

A. That don't count the tracks. I mean between the two [fol. 88] tracks. That is not counting—

Q. How far were you actually from the train?

A. I was approximately fifteen or twenty feet west of the train; twenty-five feet, I would say. I don't know the exact distance across.

Q. You say Mr. Howdershell has always asked you fellows to watch for hot boxes on the trains?

A. Yes, sir.

Q. You say he said you should drop everything you are doing and watch for hot boxes?

A. Yes. He said when a train is passing to not be working; be watching the train.

Q. He never told you to completely ignore a fire that you set, in order to watch a train?

A. No, sir.

Q. You never thought that he meant anything like that, did you?

A. No, sir.

Q. You knew you had this fire going when the train was going by?

A. Yes, sir.

Q. That was your first duty, to watch that fire, wasn't it?

A. Well, what I did was to get on up far enough, I thought I would be out of the fire, to the best of my knowledge.

Q. I know that, Mr. Rogers. I appreciate that, but what [fol. 89] I am talking about is this: you didn't in any way interpret Mr. Howdershell's orders—

Mr. Eagleton: If the Court please, just a minute. Go ahead and finish your question.

Mr. Sommers: You don't put any such construction on Mr. Howdershell's orders so as to mean that you should ignore a fire which you had set, in order to watch for hot boxes?

Mr. Eagleton: If the Court please, I object to the form of the question as being two questions in one and it is repetition, and it is not what the witness said. In other words,



he has answered the question about what his duties were to watch the cars.

The Court: Your objection is sustained as to the two questions in one.

By Mr. Sommers:

Q. There wasn't any such construction put on Mr. Howdershell's orders that you should ignore the fire you set, was there?

A. Not that I know of, no, sir.

Q. And you knew on that day it was your duty to watch that fire?

A. Yes, sir.

Q. And that was the first duty, regardless of the train?  
[fol. 90] A. He told us to watch the train when it came by.

The Court: Answer the question yes or no and then you may explain.

Mr. Eagleton: If the Court please, I don't think that is fair to the witness, to ask him what his first duty is or his second duty is or which is paramount. He was told to watch the train and he said he had to do both at the same time.

Mr. Sommers: Oh, now——

The Court: The witness may answer the question the best he can.

By Mr. Sommers:

Q. You knew that was your primary duty, to watch that fire, didn't you?

A. Yes, sir. I was to fire the weeds and vegetation.

Q. Now, Mr. Rogers, when you fell you were on this incline, you say?

A. Yes, sir.

Q. And that is the ballast right up next to the ties. Is that right?

A. Yes.

Q. Did you slide on down? What did you do after that?

A. The first thing I did, my feet slid out from under me. [fols. 91-96] As I was turning I tried to stay straight with the flat surface. When I came in on this incline my feet slid out from under me. When my feet started to slide I leaned forward to balance myself. Then I fell——

Q. You say your feet slipped out this way (indicating)?

A. Yes, sir.

Q. And at the same time you leaned forward?

A. Yes, sir.

Q. Your back didn't go back at all?

A. Yes, sir. Let me finish, please, sir. When I sit in a sitting position on this incline, I also slid. My seat slid on the same as my feet; that turned me on my back.

Q. Your feet went out from underneath you; you fell down on your fanny and then rocked on back?

A. Yes.

Q. That is the way it happened?

A. Yes.

Q. After that what happened?

A. Well, the next thing I remember I was in the bottom of the water drainage.

Q. Did you fall down in the bottom of the water drainage?

A. Well, as far as I know I slid on down in the water drainage.

[fol. 97] Q. When you were standing waiting for this train to go by you had your can on the edge of the tie, did you not?

A. Yes.

Q. You had hold of one handle of it?

A. Yes.

Q. How long is that handle?

A. Approximately three or three and a half feet.

Q. So you were right up next to the ties yourself, within three feet of them?

A. Yes, sir; the length of my arm and the three feet.

Q. The length of your arm and the three feet?

A. Yes.

Q. Were you standing on any gravel at that time?

A. No, sir. I was standing on the flat surface.

Q. Then you must have backed up on the gravel when you backed up. Is that right?

A. Yes, sir, I must have.

Q. You did, Mr. Rogers, at the time, if you were facing—let's see. You were facing east watching this train go by like this, weren't you?

A. Yes.

Q. You had hold of the can with your right hand?

[fols. 98-110] A. Yes.

Q. Standing here like this watching that train go by?

A. Yes.

Q. And you did turn like this, with your arm over your face, and walked backwards?

A. Yes.

Q. You had your arm over your face all that time?

A. Yes, sir. I turned south and west as I was backing away.

Q. You walked about three or four steps backward with your arm over your face?

A. About three or four.

Q. That would be approximate?

A. Yes.

Q. With your arm over your face all that time.

(No response by witness.)

[fol. 111] Redirect examination.

By Mr. Eagleton:

[fol. 112] Q. Now, when you were at the place where you  
[fol. 113] started after you heard this engine coming, how did you go to the place about thirty yards north of there? Did you walk or run?

A. I was running.

Q. When you got there you say the engine was already going by?

A. Yes.

Q. Were you on a path?

A. Yes.

Q. And that path would be about how wide?

A. Approximately three or three and a half feet wide.

Q. Is there a path normally provided across the culvert, right contiguous with that path?

A. Yes.

Q. How wide is the path across the culvert?

A. Approximately the same width.

Q. Two and a half or three feet wide?

A. Yes.

Q. Did you use that path on the culvert as you went north to get away from this fire?

A. Yes.

Q. On that day what was it covered with?

A. Loose rock, crushed gravel.

[fols. 114-177] Q. What were the instructions to the section gang with reference to permitting or allowing loose rock to be on that path across the culvert?

A. When there is loose rocks, any time we take out a tie or anything and move the rocks from the incline, he would have us to clean it out and put them back where they were so the men would have a safe place to walk.

Q. Who told you that?

A. The foreman.

Q. Mr. Howdershell?

A. Yes.

Q. And that is the very place you were on; it was sloping and an incline instead of being level at that point?

A. Yes, sir.

[fols. 178-179] JAMES C. ROGERS, having been heretofore duly sworn, testified further as follows:

Further direct examination.

By Mr. Eagleton:

[fol. 180] Q. Now, one other thing I wanted to get. At the time you came up from the place where you had been burning the leaves or weeds when you heard this train and you went up to this spot towards the culvert; I believe you say you *ran* up there?

A. Yes, sir.

Q. When you ran up there what did you do as soon as you got far enough away that you thought you were safe from the fire? What did you do?

Mr. Sommers: I object to the leading and suggestive question, your Honor and statements by counsel. I further object because this is repetition.

The Court: Part of the question is objectionable.

By Mr. Eagleton:

Q. What did you do as soon as you got up to the point thirty or thirty-five yards from the fire?

A. I turned my body east and watched the train go by.

Q. At that time, I believe, you said that the engine had gone by. Where was the first car attached to the [fol. 181] engine.

A. It was even——

Q. About even with you?

A. Yes.

Q. How long was it you were in that position before you felt this flame or the burning process, how many cars had gone by?

A. Approximately three or four.

Q. About how fast would you say that train was moving?

A. I would say thirty-five or forty miles an hour. It was a rapid speed.

Q. Had you, when you went up there, made any survey of the situation that was north of there or the culvert, at that time?

A. No, sir, I hadn't.

Q. Did you know at that time or did you see at any time before you got hurt, that culvert was covered over with a sloping substance of rock and gravel?

A. No, sir, I didn't.

Q. Had you ever seen a culvert covered in that manner, sloping in that manner before?

A. No, sir.

Q. When was the first time you knew it was covered in that manner and sloping in that manner?

[fol. 182] A. When I backed in on it and started falling.

Q. The level portion of the culvert you spoke about, that is normally two and a half feet wide and made of concrete, to what extent was it covered with this sloping down rock and gravel from the ties?

A. It was all covered.

Q. Practically all covered?

A. Yes, sir.

Mr. Eagleton: I believe that's all.



Further recross examination.

By Mr. Sommers:

Q. How long is this section you worked on down there?

A. Sir?

Q. How long is the section?

A. In miles?

Q. Yes.

A. I don't really know.

Q. You were working on that—when did you go to work? Was it about May 21st or somewhere around there?

A. It was in May. I don't remember—

Q. Somewhere in the last two weeks of May?

A. I don't remember. We moved to town in May; I remember that. That is when I started working there.

[fol. 183] Q. Here is your application and the date on there is 5-17-51. Is that right?

A. Yes, sir.

Q. That is the day you filled it out and signed it?

A. I didn't fill it out.

Q. Had it filled out and signed it?

A. Yes, sir.

Q. You didn't go to work on that same day, did you?

A. No, sir. It was filled out at night.

Q. Down here is a section that says you were employed on 5-21-51. Would that be about right?

A. Yes.

Q. So you went to work about on the 21st of May?

A. Yes.

Q. Mr. Rogers, between the 21st and the 12th of May, at least, you had worked all up and down that section, had you?

A. Repeat that, please.

Q. Between the 21st of May and the 12th of July you had worked all up and down that section on various things, hadn't you?

A. Yes, sir.

Q. You say that you had never seen this culvert or any culvert like it?

[fol. 184] A. I had seen the culvert; but I hadn't noticed that it was covered over by this loose rock.

Q. What was this loose rock up there for?

A. Well, it was the incline that is supposed to have been up at the end of the ties.

Q. Well, wasn't it up there?

A. Yes, sir, but it had shaken down and covered—the vibration from the trains had shook it down off the end of this culvert and made a sloping incline.

Q. How much difference is there from the west rail of the west track to the end of that culvert, would you say?

A. I would say approximately five feet.

Q. Five feet?

A. Five or six feet.

Q. Five or six feet. All right. So, there is five or six feet that you would have to cross over that culvert without walking on the rails. Is that right?

A. Yes, sir.

Q. Being outside of the tracks. You had five or six feet?

A. Yes.

Q. You say that was gravel in there, five or six feet?

A. No, sir, not all the five or six feet isn't gravel.

Q. Well, describe it.

[fol. 185] A. Sir?

Q. Describe it.

A. There is a flat surface of dirt on the shoulder of the road.

Q. What about the culvert now? Is there a flat surface over the culvert?

A. On most culverts, yes, sir.

Q. How about on this culvert?

A. No, sir, there wasn't.

Q. I am talking about this culvert. Will you describe what was there on that culvert?

A. Yes, sir. There was the rails, the ties, and then this incline.

Q. That incline is the built-up ballast that holds the ties and the rails in place, is that correct, or upon which the ties and rails are placed?

A. Yes, sir.

Q. That is there for a proper purpose, is it?

A. Yes, sir, as far as I know.

Q. That incline, is that what you slipped on?

A. Yes, sir, it is.

Q. So that you had backed up onto that incline when you slipped?

A. No, sir. I had backed due north from where I was standing on the flat surface. I didn't back up east, next [fol. 186] to the rails.

Q. How long is this incline?

A. Well, from the end of the ties it is approximately three feet, is all, from the end of the ties.

Q. Was there two or three feet more on the culvert there that was not incline?

A. No, sir. The rocks had fallen down and had covered it over.

Mr. Eagleton: (Q.) Covered over what?

The Witness: Sir?

Mr. Eagleton: Covered over what? The flat surface?

The Witness: Yes, sir. It covered over the flat surface.

By Mr. Sommers:

Q. That is what I am getting at. There was a flat surface up there, you say?

A. Yes, there is a flat surface. I mean the bridge is built flat.

Q. The bridge is built flat?

A. Yes.

Q. Then you have got about three feet of flat surface and then about three feet of incline?

A. No, sir, you don't have that much.

Q. Didn't you say there was five or six feet of it [fol. 187] there?

A. From the rail; the ties then stick out from the rail a ways.

Q. How far do the ties stick out?

A. Approximately a foot or foot and a half; I don't know just how far. They do stick out a ways.

Q. Was there any flat surface at all—I am not trying to argue with you—I just want to get it straight.

Mr. Eagleton: You mean on the culvert?

Mr. Sommers: I am talking about on this culvert.

By Mr. Sommers:

Q. I thought you testified a minute ago there was about six feet from the rails.

A. Yes.

Q. Before you got to the end of the culvert?

A. Yes.

Q. I thought you testified—you can correct me if I am wrong, because I am not trying to argue with you—I thought you testified that it was all covered with gravel, that six feet. Is that right?

A. Yes, sir, it was.

Q. But that part of it was a flat surface?

A. The flat surface was also covered.

[fol. 188] Q. That is what I am getting at. It was covered, but it was a flat surface there?

A. No, sir. It was covered, and from the ties above being higher, the rocks shaking down, moving down, had caused an incline of about thirty-five feet.

Q. Then it was all incline?

A. Yes, sir.

Q. That is what I am trying to get at. At this particular point on this culvert you were on the incline when you slipped and fell?

A. Yes.

Q. It was all incline; there wasn't any flat surface there?

A. No.

[fol. 189] Q. By the way; hadn't you actually worked around this culvert, this very culvert, cleaning out the waterway there while you were on that section gang?

A. Yes. I was clearing out the water drainage on down [fol. 190] below the highway and the railroad dump. The highway is west of the railroad.

Q. Well, I am talking about this particular culvert. That culvert is to carry water, isn't it, under the right-of-way?

A. Yes, sir.

Q. So that this dump would kind of form a dam so far as water is concerned, wouldn't it?

A. No, sir. It has openings in it.

Q. This culvert?

A. Yes; underneath.

Q. That is the purpose of it, so that the dump won't dam up surface water?

A. Yes, sir.

Q. So far as this particular culvert was concerned hadn't you worked around there with Seratt and the other boys, cleaning that out, keeping it free for the water passage?

A. At one time, yes, sir. I helped cut grass down in the bottom between the railroad, but not upon the shoulder or right at the immediate place of the bridge or of the culvert.

Q. Well, if you would stand down at the bottom of the culvert it would only come about this high, wouldn't it?

[fol. 191] A. Approximately three and a half or four feet high.

Q. So if you were working down here this thing was right in your face, wasn't it?

A. No, sir. I didn't work right up to the culvert. We worked in teams, cutting each way. There was two of us with briar scythes or weed cutters and we started at one place, I mean we was stationed all along cutting this grass out. I did help cut it, but not right at the culvert.

Q. You knew that culvert was there?

A. Yes; I had noticed it was there.

Q. You knew it was there when you ran up to it that day? You knew it was there when you ran up to it that day?

A. Yes, I noticed it because I was running north.

Q. You knew you had run right up close to it?

A. Yes, sir. At the time I knew that the culvert was there, at that time.

Q. And so far as that is concerned the culvert wasn't any mystery to you, was it?

A. No, sir. I paid no attention to the culvert when I [fol. 192] got there. The train had already overtaken me at that point.

Q. Well, from your other experiences on the railroad you knew what that culvert looked like—I mean from your other experiences of working around down there and right over that culvert, you knew all about that culvert?

A. No, sir, I didn't know all about it.



Q. Did anybody come running up to you after the accident, Mr. Rogers?

A. At the point that I reached back up on the dump—

Q. That was about ten yards north of the culvert?

A. Some ways north, yes, sir.

Q. Did anybody come up there to you?

A. It seems to me they did; I am not sure. I mean at that point I don't remember exactly what happened, but I do remember of seeing someone shortly after that and asking for a drink of water. I am almost sure someone came to me at that point, but I wouldn't say for sure.

Q. Do you know of any witnesses to this accident?

A. No, sir, I don't.

Q. No one has ever told you they saw you fall or anything like that?

[fol. 193] A. No, sir, they haven't.

Mr. Sommers: That's all.

Further redirect examination.

By Mr. Eagleton:

Q. Mr. Rogers, without belaboring this thing, Mr. Sommers asked you if the ballast was placed there for a proper purpose under the ties, and so forth. Was the ballast that was placed under the ties, was that ballast supposed to be kept off the flat surface of this culvert?

A. Yes, sir, it was supposed to be.

Q. Did you know it was covered with that stuff, on that incline, before you got hurt?

A. No, sir, I didn't.

Mr. Sommers: You were standing right next to it?

The Witness: Yes.

By Mr. Eagleton:

Q. When you turned your head and put your hand over your face, why did you turn your head and why did you put your hand over your face?

A. When I felt the heat of the fire I turned facing it, backing away, and I put my arm over my face to keep the fire from burning me.

[fol. 194] Mr. Eagleton: That's all.

Further recross examination.

By Mr. Sommers;

Q. You say the fire was clear up as high, as tall as you are. Is that right?

A. Yes; at times it was.

Q. Particularly at this time?

A. Yes, at this point.

Q. Was it really the fire, Mr. Rogers, or the smoke that got into your eyes?

A. It was the fire and smoke both. I mean the fire was right on me.

Q. These weeds you were burning wouldn't be over knee high, would they?

A. Yes, there is places they were shoulder high.

Q. They already had been killed off?

A. Yes. Where I started, at the crossing, they were small; just small bunches of small stuff. Further down this lower part that I came towards, this water drainage, the vegetation was higher.

Q. Was it any thicker?

A. Yes; thicker.

Mr. Sommers: All right. That's all.

[fol. 195] Mr. Eagleton: That is all. Plaintiff will rest, if the Court please.

(The following proceedings were had outside the hearing of the jury.)

Mr. Sommers I would like to file this and be heard on it, if I may (Handing paper to the Court). Maybe we could take our morning recess a little bit early, because I have got to call up, I have got some exhibits that I have neglected to bring with me and I would like to call my office and have them brought over here before we proceed.

The Court: We will have our morning recess at this time.

(At this point there was a recess.)

**MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S  
CASE—Filed April 14, 1954**

Comes now Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, the defendant herein, and at the close of all the evidence offered on behalf of the plaintiff herein, moves the Court to direct a verdict in favor of the defendant for the following reasons:

1. Under the law, the pleadings, and the evidence there [fol. 196] is no submissible jury issue in the case and, under the law and the pleadings, the evidence is not sufficient to make a jury issue or a jury question;

2. Under the law and the pleadings, the evidence on behalf of plaintiff does not give rise to a cause of action against this defendant;

3. The evidence does not raise a question of fact as to any negligent act or omission on the part of this defendant, his agents, servants or employees;

4. The evidence of the plaintiff affirmatively establishes that there was no act of negligence on the part of this defendant, his agents, his servants or his employees;

5. The evidence on behalf of plaintiff fails to establish any act of negligence on the part of this defendant, his agents, servants or employees which caused or contributed to cause plaintiff's injuries, if any;

6. The evidence on behalf of plaintiff affirmatively establishes that there was no act of negligence on behalf of defendant, his agents, servants or employees, particularly no act of negligence as pleaded in plaintiff's petition, which caused or contributed to cause plaintiff's injuries, if any;

7. The plaintiff has failed to sustain the burden of [fol. 197] proof of the issues raised in his petition;

8. Under the law, the pleadings and the evidence, the defendant is entitled to a directed verdict in his favor.

(Filed April 14, 1954.)

Defendant's Motion for Directed Verdict at Close of Plaintiff's Case was by the Court Overruled.

[fols. 198-222] DEFENDANT'S EVIDENCE

The defendant offered and introduced the following evidence:

[fols. 223-228] M. C. GALLOWAY, being first duly sworn, testified as follows:

**Direct Examination.**

**By Mr. Sommers:**

Q. Tell the jury your name, please.

A. M. C. Galloway.

Q. Where do you live?

A. Seven miles from McRae.

Q. Out in the country?

A. Yes, sir.

Q. Down in Arkansas, McRae, Arkansas?

A. Yes, sir.

Q. What do you do for a living?

A. Work on the section at McRae.

Q. Is that Section 20?

A. Yes, sir.

Q. Is that the section Mr. Howdeshell is foreman of?

A. Yes, sir.

Q. How long have you worked on the section?

A. Since the 12th of March in '51.

Q. The 12th of March, 1951?

A. Yes, sir.

Q. Do you know Mr. James C. Rogers who is the plaintiff in this lawsuit?

A. Yes, sir.

[fol. 229] Q. Has he ever told you about what happened on the 17th of July down there?

A. No, sir.

Q. Do you remember what he was doing the last day that he worked?

A. Yes, sir.

Q. What was he doing?

A. He was burying the right-of-way, the shoulder from the crossing north.

Q. He was burying the shoulders. What were the rest of you fellows doing?

A. Putting in ties.

Q. On north of him?

A. Yes, sir.

Q. Did Mr. Rogers later leave the job that morning?

A. Yes, sir.

Q. When was the first you knew, that is, knew anything—well, wait a minute. What happened there that morning concerning Mr. Rogers?

Mr. Eagleton: Talking about July 17th?

Mr. Sommers: On the last day he worked down there.

A. Well, he was up in the motor car when the foreman [fol. 230] come and hollered to help load the car.

Q. He was up at the motor car?

A. Yes. We all gathered to load the car and decided to go down to the tie yard to get Jeff Clohr.

The Court: We are not railroad people. You will have to speak out so we can understand these things.

By Mr. Sommers:

Q. Did he at any time tell you then that morning that he had fallen on the right-of-way?

A. No, sir.

Q. Has he ever told you that since?

A. No, sir.

Q. When you were up there was he able to talk?

A. Yes, sir.

Q. He did talk, or did he talk?

A. Yes, sir.

Q. Did he at that time appear to be dazed?

A. No, sir.

Q. Or that he had taken leave of his senses in any way?

A. No, sir.

Q. He didn't say anything to any of you about slipping and falling. Is that right?

A. No, sir.



Mr. Eagleton: I object to that—  
The Court: Objection sustained.

By Mr. Sommers:

Q. Mr. Galloway, I will ask you this: Have you burned [fol. 231] grass on the right-of-way?

A. Yes.

Q. How do you do it?

A. With a hand torch.

Q. You heard Mr. Rogers describe this fire machine they use?

A. Yes, sir.

Q. Has that been used while you were on the railroad?

A. No, sir.

Q. What is it used for now?

A. It is converted into a spray machine.

Q. Just used to spray?

A. Yes.

Q. At any time have you even seen a fire machine used on the railroad?

A. No, sir.

Q. I will ask you, Mr. Galloway, if there are any paths along the railroad right-of-way anywhere that you have seen?

A. No, sir.

Q. That men walk on?

A. No, sir.

Q. Have you ever as section man, as part of the crew down there, been assigned to shovel up gravel and make a path?

A. No, sir.

Q. How about over culverts: Did you ever see a path over a culvert?

A. No, sir.

Q. Where do you men walk when you want to walk some place?

A. If there happens to be a wide enough place on the shoulder, we walk on the shoulder. If not, and no train is [fols. 232-233] coming, we walk in the middle of the track.

Q. Do you ever get down off the dump and walk?

A. I have.

Q. After Mr. Rogers left that day what did the rest of you do?

A. We put in a few more ties and put plates on the new ties and spiked them up.

Q. Did Mr. Howdeshell go with Rogers?

A. Yes.

Q. After Mr. Howdeshell came back—well, withdraw that. Did you ever see where Mr. Rogers' torch was?

A. Yes, sir.

Q. Where was it?

A. It was approximately three hundred or four hundred feet from the culvert.

Q. Which way from the culvert?

A. North.

Q. It was north of the culvert three or four hundred feet?

A. Yes.

Q. Where was it—I mean with reference to the track?

A. Laying on the shoulder.

Q. Laying on the shoulder. Had the grass been burned there?

A. Yes, sir.

Q. Was it burnt up to where the torch was lying?

A. Yes, sir.

[fols. 234-235] Cross-examination.

By Mr. Eagleton:

[fol. 236] Q. This matter of walking on the shoulder: Don't you always walk on the shoulder of the road, the railway, either side of the railroad tracks, whenever you can?

A. If there happens to be a decent place to walk there, I do. Otherwise, I don't if it is sloping.

Q. That is where you walk whenever your work requires you to walk: On the shoulder?

A. That's right.

Q. You don't walk up on the ties if you can avoid it?

A. Not if there is a better place to walk.

Q. With a train going by, have you received instructions that when one train is passing, never to get on the other track, because the noise of the one train may keep you from hearing it and be in danger?

A. Yes.

Q. You receive those instructions?

A. Yes.

Q. Was there a worn path both north and south of this culvert on July 17th, 1951?

A. Not that I remember.

Q. Did you go down and look at it after he was hurt?

A. I have passed by there.

Q. Did you make any particular inspection of the culvert after he was hurt so you would know whether there was or not?

A. No, I didn't.

[fol. 237] Q. Did you go down to the culvert after he was hurt?

A. Just walked by there one day.

Q. I mean right after he was hurt. You say this torch—

Mr. Sommers: The same day?

Mr. Eagleton: The same day.

A. No, I didn't, the same day.

By Mr. Eagleton:

Q. You didn't note of the fact his torch was three hundred feet north of the culvert, did you? Did you take note of it that day?

A. Yes, sir. I noticed when they picked it up.

Q. You made a note in your own mind. That torch was nothing that was new to you, was it? In other words, it was a thing you have always used there in your time?

A. Yes.

Q. You not only noted the fact that they picked up the torch, but you noted the place where they picked it up?

A. I don't know the exact place. I said approximately from three to four hundred feet.

Q. I don't mean the exact place. It might have been two hundred and ninety-nine or three hundred and fifty-one, but you were making, on July 17th, 1951, after this man was injured and after he had been taken by the foreman to Beebe in this station wagon, you made a note of the exact place or the approximate place, we will put it, that [fol. 238] they were picking up this torch, were you?

A. Well, I suppose.

Q. Why were you making that note? Why were you interested in how many feet it was north of the culvert?

A. Well, I wasn't particularly interested at that time.

Q. You were interested enough to make a note of it?

A. Well, I happen to remember it.

Q. Can you remember any other detail? You didn't think the man was injured in connection with the torch at that time, did you?

A. No, sir.

Q. And notwithstanding the fact he was not injured with it, you saw the torch there and you made a note of that one incident. Is that right?

A. Well, I didn't know he had a new injury that day until the boss came back and was telling us about it.

Q. I understand you made a note of the torch, where the torch was, notwithstanding you had no knowledge of his injury. Is that correct?

A. Well, I remember where it was.

Q. All right. You said that. Did you ever go back that day—how long did you work that day, Mr. Galloway?

A. Until three-thirty, quitting time.

Q. Did you ever go back that day between eleven o'clock, [fol. 239] the time he was injured, and three-thirty that afternoon, quitting time, to this culvert, to look to see what its condition was?

A. No, sir.

Q. Can you tell me whether or not it was covered with sloping-down rocks and gravel and so forth on that day, the culvert, or that it was not covered, either one?

A. I suppose it was. It was on the slope there.

Q. Did you go down and look at it?

A. No, sir.

Q. You did not. Did you go further south and look to

see if there was a path running along there, a worn path, a path that had been used so much it was worn, just south of that culvert?

A. No, sir.

Q. Is there such a path there?

A. Not to my knowledge.

Q. How many times have you been there since? When were you there last?

A. I don't remember any particular time working right at the culvert. We passed by several times.

Q. Did you take a look at it with special note to see whether there was or was not a path there?

A. No, sir.

Q. Never have?

A. No, sir.

[fol. 240]. Q. So you really don't know whether there is a path there or not, do you?

A. No, sir, I don't.

Q. There may be?

A. Are you talking about a path down the side of the track from the culvert?

Q. I am talking about a path that runs north and south, immediately west of the west set of tracks, which is the southbound main at the particular culvert—you say this torch was three hundred feet north of that culvert, so you have got that culvert in mind.

A. There is no path there. There is a wide shoulder, but no path.

Q. No path worn?

A. No, sir.

Q. Never has been?

A. Not since I have been there.

Q. You mean down to date?

A. Yes, sir.

Q. When was the last time you were by there?

A. One day last week. I don't remember the exact—

Q. Did somebody, one day last week, ask you to go by and look at it?

A. No, sir. We just went by going over the track.

Q. Has anybody ever asked you to go by and look at it?

A. No, sir.



Q. Has the claim agent asked you to do that?

[fol. 241] A. No.

Q. You did go by and look at it one day last week?

A. Just riding by on the motor car, watching the right-of-way.

Mr. Eagleton: All right. That's all.

Redirect examination.

By Mr. Sommers:

Q. Mr. Galloway, you worked only on Section 20. Is that right?

A. Well, that is my main stand. Sometimes we switch work with other sections, unloading heavy equipment and such as that.

Q. How long is that section?

A. Seven and a half miles.

Q. When you work on a particular section does that mean that from day to day you will go out within this seven and a half miles and perform work?

A. Yes.

Q. Where does that section extend from? Where is the beginning of it?

A. Mile post 303, which is north of Garner.

Q. North of Garner. Where do you fellows start out from in the morning?

A. At the tool house.

Q. Where is the tool house—I mean the town?

[fol. 242] A. At McRae, Arkansas.

Q. Which way do you go out of McRae to get to Section 20?

A. We are on Section 20 to start with.

Q. Which way does Section 20 run out of McRae?

A. North and south.

Q. Is McRae on the south end or the north end or in the middle, or where?

A. Pretty close to the middle.

Q. It is pretty close to the middle. Now, Garner Crossing is which way from McRae?

A. North.

Q. So every time that you want to go north out of McRae you will go past Garner Crossing. Is that right?

A. If you want to go that far whenever you do.

Q. Any where on this seven and a half miles, Mr. Galloway, is there any path that is maintained for section men to walk on?

A. No, sir.

Q. Are section men any place there required to shovel off themselves a path?

A. No, sir.

Q. Never has been there as long as you have been on the railroad?

A. No, sir.

Mr. Sommers: That's all.

Mr. Eagleton: That's all. I want you to remain in Court.  
[fol. 243] He is not to be excused.

Arnold McAllister, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sommers:

Q. Mr. McAllister, will you speak out good and loud so the jurors can hear you. State your name.

A. Arnold McAllister.

Mr. Eagleton: Arnold is the first name?

The Witness: Yes.

Q. (By Mr. Sommers:) Where do you live?

The Court: Lawrence?

The Witness: Arnold.

Q. (By Mr. Sommers:) Where do you live, Mr. McAllister?

A. McRae, Arkansas.

Q. Are you married?

A. Yes, sir.

Q. What is your job? What do you do for a living?

A. Now I am assistant foreman on extra gang Number 4, Arkansas Division.

Q. For the Missouri Pacific Railroad?

A. Yes, sir.

Q. How long have you been working for the railroad?

A. Four years, approximately.

Q. When were you made assistant foreman?

[fols. 244-245] A. Well, the first time I went out as assistant foreman was August 25th, '51.

Q. August 25th. You have been assistant foreman ever since?

A. No. I went back to Section 20, labor, May 8th, '53 or '52—'53 is right.

Q. You went back to Section 20 on May 8th?

A. Yes.

Q. Since that time you have been made assistant foreman on the section gang?

A. No. I have been made assistant foreman the 16th of November in '53.

Q. The 16th of November. That is on extra gang Number 4. Is that right?

A. That's right.

Q. Were you on the section gang or part of the section gang that Mr. Rogers worked with while he was there?

A. I was.

Q. How long have you known Mr. Rogers?

A. Well, all his life.

Q. All of his life. Now, were you there all the time that he worked on the railroad?

A. I was.

Q. On that section gang?

A. Yes, sir.

[fol. 246] Q. Now, on the last day that he worked down there, what did he do on the last day down there?

A. He was given a hand torch to burn the shoulder where the spray machine had poisoned the vegetation and killed it, to burn the vegetation.

Q. Who gave him the hand torch?

A. Our foreman, Mr. Howdeshell.

Q. Did you hear Mr. Howdeshell say anything to him?

A. He told him if he was able to work he could take that torch, it would be light work to work with.

Q. Did Rogers say he was able to work?

A. He said he thought he was.

Q. Thought he was able to fire the right-of-way?

A. Yes.

Q. What did the rest of you do?

A. We put in ties under the track.

Q. Where were you from where Mr. Rogers was?

A. We were north of him.

[fol. 247] Q. What else happened that morning so far as Mr. Rogers was concerned?

A. Well, as far as I know the next thing I knew about Mr. Rogers he came up past us and told the foreman his back was hurting him.

Q. Then what happened?

A. He asked him if he wanted to go to a doctor or go home. He said there had to be something done. So the foreman said he thought it best to go to a doctor.

Q. Did he say anything about falling on the railroad or on the right-of-way?

A. Not in my presence.

Q. What happened after that, Mr. McAllister?

A. Well, the boss told us to load the motor car. We started to do that, and he decided differently; thought it would be better and easier on the men to take him in the station wagon of one of the boys that was loading ties down at Garner. He sent one of the men to the station and came back and put him in the station wagon and carried him to the doctor.

Q. Did you help him over to the station wagon?

A. I did.

Q. Did you notice whether he had any singed eyebrows or singed hair?

A. I did not.

Q. You didn't see any?

A. I didn't see any.

[fol. 248] Q. Did he say anything about fire in his face?

A. Not in my presence.

Q. Mr. McAllister, is there any path on the right-of-way that men shovel up, keep clear for themselves to walk on?

A. Definitely not.

Q. Any place that you have worked on the right-of-way down there?

A. No, sir.

Q. You have worked on more than one section?

A. I have.

Q. Did you ever see one any place in Arkansas?

A. I haven't.

Q. Did you ever see any paths across culverts?

A. I have not.

Q. Do you know this culvert where this man claims he fell?

A. I do.

Q. Is it any different than any other culvert on the railroad?

A. No difference that I know of.

Q. How far have you worked on the railroad down there?

A. I worked from G. G. Junction, north of Bald Knob, to the yard limits in North Little Rock.

Q. How far is that?

A. Approximately fifty miles.

Q. Is there any place in that area where there are paths?

A. No.

[fol. 249] Q. For men to walk on?

A. No.

Q. Where do they walk when they want to walk?

A. Well, some walk on the shoulders and some walk between the rails and some between the track. Some will walk ahead of the ties on the outward end of the track.

Mr. Sommers: That's all.

Cross-examination.

By Mr. Eagleton:

Q. Did you ever go back to this culvert to look and see what its condition was shortly after the plaintiff, Mr. Rogers, was taken to the doctor that day?

A. I did not.

Q. Did you look at it any day since?

A. Well, I seen it several times since.

Q. Recently, too.

A. No, not recently.

Q. Did you look at it any day, the next day or the next day or two after this accident of July 17, 1951?



A. Sure, I looked at it, as we was patrolling the track.

Q. Did you ever see any path, worn path, that leads immediately south of the culvert and back south towards the Garner Crossing?

A. No, sir.

Q. You say there is none there?

A. Not to my knowledge.

Q. That includes up to date?

[fol. 250] A. Up to date.

Q. As a matter of fact, right now isn't that culvert—

Mr. Sommers: Wait a minute. This is three years since this fellow got injured. I don't know what the situation is down there now. I don't think there is any ground for going into that kind of testimony.

The Court: Wait a minute.

Mr. Eagleton: He said it is in the same condition now as then. I am asking him what its present condition is.

The Court: Overruled.

By Mr. Eagleton:

Q. As a matter of fact, Mr. McAllister, that culvert right at that place has been shoveled off and the concrete exposed, isn't it, so a man can walk on it?

A. No.

Q. Isn't it?

A. No.

Q. Isn't that the shape it is in now?

A. No, not to my knowledge.

Q. Is there a path that leads back from the culvert, a worn path, back to the Garner Crossing on the west side?

A. No, sir.

Mr. Eagleton: All right.

Mr. Sommers: That's all.

[fols. 251-258] The Court: What is the nearest house to the place where this accident happened?

The Witness: Well, I would say it would be Doctor J. R. Salome, across the highway.

The Court: Are there many people living in that neighborhood?

The Witness: Not too many.

Mr. Sommers: That is out in farm country, isn't it?

The Witness: Yes; beyond the edge of town, yes, sir.

Mr. Sommers: No settlement right near there?

The Witness: No.

Mr. Sommers: Where people would walk frequently across there or anything like that?

The Witness: Not too frequently, no.

Mr. Sommers: That's all.

(At this point a recess was taken from 12:20 P.M. until 2:00 o'clock P.M.)

At 2:00 o'clock P.M. on said 14th day of April, 1954, the trial was resumed.

[fol. 259] E. L. Cook, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sommers:

Q. Tell the Court and jury your name, please.

A. E. L. Cook.

Q. What does the E. L. stand for?

A. Elmer Louis.

Q. Where do you live, Mr. Cook?

A. One-half mile south of McRae, Arkansas.

Q. How old a man are you?

A. Thirty-seven years old.

Q. Are you married?

A. Yes, sir.

Q. Where are you employed?

A. Section 20, Missouri Pacific, on the Arkansas Division.

Q. How long have you worked for the railroad?

A. This last time about three and a half years.

Q. You worked for them before, I take it from your statement?

A. Yes.

Q. Section 20 is the same section Mr. Rogers worked on?

A. That's right.

Q. How long have you known Mr. Rogers?

A. Well, along since about 1937 or 1938. They had a little county baseball league there and he played for Vinity [fols. 260-261] and I followed the McRae team a lot.

Q. You say that was 1937 or '38?

A. '47 and '48. I was discharged out of the Army in '46. It was after that.

Q. Were you on the same section with him all the time that he worked on the railroad?

A. Yes, sir.

Q. I think his testimony is from about May 21st through July 17th?

A. I don't know the date, but all the time he was there I was there.

[fol. 262] Q. What was the first thing you knew anything was wrong with him on the morning, on the last day that he worked there?

A. After Mr. Howdeshell had taken him to Beebe, he come back and reported to us that he told him at Beebe that he had got hurt, slipped on the ballast and hurt his back over again.

Q. Mr. Howdeshell told you that after he came back?  
[fol. 263] A. Yes, sir; along about noon; I think it was the noon hour.

Q. You are getting a little bit ahead of me. How about before that? Did you know they were going to take him some place?

A. Yes, sir.

Q. How did you know that?

A. Because Mr. Howdeshell called us to load the motor car.

Q. Called you to load the motor car?

A. Yes.

Q. Did you load it?

A. No, sir. We started to and someone mentioned the station wagon about eight or ten poles from where we were.

Q. The testimony has been they brought the motor car on up and they took him out on the motor car—I mean on the station wagon?

A. Yes.

Q. Mr. Howdeshell went with him. Is that right?

A. Yes.

Q. What happened when Mr. Howdeshell came back, you say?

A. He told us that Rogers told him at Beebe that he had slipped and hurt his self again.

Q. Did you ever hear Rogers say that?

A. No, sir.

Q. I mean on that day or since then?

[fol. 264] A. No, sir.

Q. Was he up there near you where you could hear him talking before he was taken out in the station wagon?

A. No, sir. I was about three or four poles from the motor car, working.

Q. Three or four poles from the motor car?

A. Yes.

Q. When you were working?

A. Yes.

Q. What about when you were loading the motor car?

A. We never did load it.

Q. Were you up there to it when you started to load it?

A. I wouldn't say for sure, but I think we was either walking up there when they thought of the station wagon

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Q. You weren't near Rogers that morning just before he left?

A. Not close to him, no, sir.

Q. Now, Mr. Cook, have you heard the testimony with regard to this path supposed to be kept shoveled off there?

A. Yes.

Q. Is there any such path on the right-of-way?

A. No, sir.

Q. Is there any path you can shovel up where you could walk on?

A. No, sir.

Q. Where do you walk?

A. We either walk on the shoulder, sometimes on the [fol. 265] track, sometimes on the ties, or in the middle of the track. It all depends on the clearance and whether a train is coming. Sometimes down in the ditches.

Q. How about the culvert down there? Is there any culvert with a pathway that is kept across it?

A. No, sir.

Q. This culvert or any other culvert?

A. No, sir.

Q. Have you burned weeds down there?

A. Yes, sir.

Q. How did you do it?

A. With a hand torch.

Q. Is that the way it has always been done?

A. I have seen a little bit burned off by just throwing a match down in it.

Q. When did you start to work there?

A. September 11th, 1950.

Q. Have you ever seen this fire machine used since September 11th?

A. Not, since I have been working there, no, sir.

Q. Tell us, Mr. Cook, what about when you stack ties: Is it the custom to burn the grass where you stack ties?

A. No, sir.

Q. How is that done?

A. We stack the ties, throw the ties out of the car and [fols. 266-282] get out there and stack them; take our shovel and drag, what we call drag—we take the shovel flat on the ground and cut the weeds and grass back about three feet all the way around.

Q. There is no burning with this torch at that time?

A. No, sir.

[fol. 283] LEO. HOWDESHELL, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sommers:

Q. Now, Mr. Howdeshell, if you will speak up real loud so all the jurors can hear you I would appreciate it. Will you state your name?

A. My name is Leo Howdeshell.

Q. How old a man are you?

A. Fifty-five years old.

Q. Are you married?

A. Yes, sir.

Q. Where do you live?

A. I live in Beebe, Arkansas, four miles south of my



headquarters, which is McRae, Arkansas where I work out of.

Q. Where do you work?

A. McRae, Arkansas; Missouri Pacific Railroad Company.

Q. What is your job with the railroad?

A. Section foreman.

Q. How long have you worked for the railroad?

A. The 28th day of this month it will be thirty years.

[fols. 284-286] Q. How long have you been a section foreman?

A. Twenty-five years.

Q. Do you know Mr. Rogers who is in the plaintiff in this lawsuit?

A. From the time I employed him—

Q. Do you know him?

A. I didn't know him before hand.

Q. You know him now?

A. Yes.

Q. Did you know him before you employed him?

A. No, sir.

Q. You say you employed him. Did you hire him on the railroad?

A. Yes, sir.

[fol. 287] Q. Now, on the morning of the 17th did you put him to work firing?

A. On the morning of the 17th he came out and I asked him how he was feeling. He said, "I feel pretty good this morning." We got on the motor car and went north from McRae to Garner, which is about three miles. I was putting in ties, going to put in ties a quarter of a mile north of this crossing at Garner. I asked him if he felt like he could take this torch and burn the shoulder off the right-of-way where the weed burner or sprayer had killed the weeds just along the shoulder.

[fol. 288] Q. What did he say to you then?

A. He said, "Yes, I can do that."

Q. Did you stop there at Garner Crossing?

A. I stopped there at Garner Crossing. I believe we got drinking water nearby and he taken the torch and started to burn the shoulder.

Q. Where did the rest of you go?

A. We went a quarter of a mile, approximately a quarter of a mile north of the crossing and turned the motor car off. The rest of the men went to putting in ties.

Q. That was about what time of the morning that you got out there? Speak right up. I don't know—can you fellows hear him back there?

A Juror: Just about. Speak up a little bit louder.

A. I don't exactly know whether I did any other work before I went up to Garner or not, but it was around between eight and nine o'clock.

By Mr. Sommers:

Q. Sometime in the morning?

A. Yes; we got up to Garner.

Q. Now, after you let him off and after the rest of you went on up there a quarter of a mile and started putting in ties, when was the next—did you see Mr. Rogers down there burning?

A. Occasionally I would look down that way and he [fol. 289] was burning along.

Q. Burning along with the torch?

A. On the shoulder with his torch.

Q. When was the next Mr. Rogers contacted you? Did he contact you after that?

A. He came to me about ten or ten-thirty, I believe it was when he came up to me and said he slipped and fell there,—no. He come to me and he said he was hurt. That is the way he first put it to me.

Q. When he first came up to you he said what?

A. His back was hurting him, hurting him bad.

Q. Then what happened? What took place then?

A. I said, "Do you want to go home or go to a doctor, or what do you want to do?"

Q. Did you order him to go to a doctor?

A. He said, "I have got to do something." I said, "Do you want to go to a doctor?" He said, "Yes." I said, "Let's go."

Q. You were going to take him to a doctor?

A. Yes.

Q. Up to that point had he said anything to you about falling?

A. No, sir.

Q. Go ahead. What did you do when he said he wanted to go to a doctor?

A. I first hollered to the gang to load the motor car.

[fol. 290] Q. Just a minute, now. Get your hand down, Mr. Howdeshell. Speak up a little louder. Your voice doesn't carry very well with this big high ceiling in this courtroom.

A. When we decided to take him to the doctor, I first ordered the men to load the motor car up. I had a friend down there that had a station wagon in the tie yard, which was about a quarter of a mile north of the crossing and I sent a man after this station wagon, because it would be quicker and easier to take the man to the doctor.

Q. Did the station wagon come?

A. Come immediately.

Q. By the way: When Mr. Rogers came up to you there did you give him a drink of water or anything?

A. No, sir.

Q. Did he ask you for one?

A. Not that I recall.

Q. Then after the station wagon came up there what did you do with him then?

A. I and one of the boys helped him to the station wagon and I carried him to the doctor.

Q. Carried him to the doctor. You say you "carried" him to the doctor. That is Southern talk for saying you rode with him to the doctor?

A. We went along. I went along with him.

[fol. 291] Q. Now, was he able to talk?

A. Yes, sir.

Q. Did he talk to you on the way to the doctor?

A. Yes.

Q. Did you go to the doctor with him?

A. I went to the doctor with him. I told the doctor this boy's back was hurting again. The best I remember, he just started to pull his shirt off to examine him. And Roadmaster J. F. Smith, which is my boss, just rolled up over on the railroad, just a block from this doctor's office and I went out there to report the incident to him.

Q. You were talking to Mr Smith for awhile. Is that right?

A. I talked to him a few minutes.

Q. Then what did you do?

A. I went back to the doctor's office, just as Mr. Rogers was coming out of the door.

Q. He was coming out of the door. And then where was Mr. Clohr while this was going on?

A. Mr. Clohr, the man that hapled us to the doctor, was waiting for us at the curb nearby in the car.

Q. When you went back to the doctor's office when Mr. Rogers met you coming out of there did you say anything to him then?

A. I asked him if he was ready to go. He said yes.

Q. What did you do then?

[fol. 292] A. We got in the station wagon and this fellow Clohr—he is a tie man—he asked me if I had time for him to run to the station, to the depot over there, which is about a block and a half away, to bill out a car.

Q. Did you go over to the depot?

A. We went over to the depot. He gets out and goes in the depot and I and Mr. Rogers remained in the station wagon.

Q. While you and Mr. Rogers were sitting in the station wagon did you have a conversation with him?

A. Yes.

Q. What did he say to you?

A. He told me, while we were sitting in the station wagon, he said, "Mr. Howdeshell, I slipped and fell on the ballast this morning and hurt my back."

Q. Had he at any time previous to that said anything about slipping on the railroad?

A. No, not at all.

Q. After he told you that did Mr. Clohr come back out after awhile?

A. In a few minutes.

Q. Then what did you do then?

A. I taken Mr. Rogers home.

Q. You say you taken Mr. Rogers. Mr. Clohr was driving the car?

A. He was doing the driving.

[fol. 293] A. I went along with him, taking him home.

Q. Did you leave Mr. Rogers there at home?

A. Yes.

Q. Where did you go?

A. I went back to my job.

Q. You went back to your job. Did you tell the men there that he said he had fallen?

A. When I got back to the men, of course, they was asking me what happened. I said Mr. Rogers said he fell, slipped and fell on the ballast and hurt himself.

Q. Did he ever at that time say anything about a culvert being involved?

A. Not to me, no, sir.

Q. When did you first hear about a culvert being involved?

A. The Sunday after the 17th; I believe it was on the 20th, if I am not mistaken, when this attorney came down and taken statements from some of us boys.

Q. You mean the attorney told you?

A. He come up there and wanted a statement from me in regard to Mr. Rogers slipping and falling on a culvert. This was the 17th—I believe Sunday was the 20th. Anyhow, the Sunday following the 17th.

Q. When you went back on the section, Mr. Howdeshell, after you had taken Mr. Rogers home there what did you do then?

A. After taking Mr. Rogers home I went back to my [fol. 294] gang, got in my motor car and taken the gang to McRae on the motor car. I got in my automobile and goes back to Beebe and files a wire message to my supervisory officers, which consist of the Superintendent, the Division Engineer and the Roadmaster.

Q. The wire message was in regard to this—

A. This second injury.

Q. What was done with the man's torch, or where was the man's torch?

A. Well, when I got back after taking him to the doctor, I believe one of the boys picked it up and laid it on the shoulder.

Mr. Eagleton: Is this something somebody told you?

The Witness: I saw it.



Mr. Eagleton: All right. Go ahead.

The Witness: It was laying on the shoulder; not burning. All the grass and weeds had burned up to right where the torch was laying.

By Mr. Sommers:

Q. All right. Now, did you do anything about the spot where the torch was that day?

A. Nothing except I marked the rail with a piece of yellow crayola, chalk.

Q. You mean crayon?

A. Yes; crayon.

Q. Why did you do that?

A. After I went back and made the second report I [fol. 295] knew the claim agent would be out making another investigation and I would have a marker there where his torch was laying.

Q. Have you had other accidents on that section in your lifetime?

A. Yes.

Q. So you marked that point that day where you found the torch. Is that right?

A. Yes.

Q. Thereafter were you called upon to show the claim agent where that was?

A. Yes, sir. The claim agent came out, I believe it was on the 25th following the 17th and taken statements, and we measured it, he and I.

Q. Where did you measure it from?

A. From the center of the culvert.

Q. From the center of the culvert. That was the 25th; that was three days after you talked to the lawyer. Is that right?

A. Yes; after the lawyer said that he slipped and fell on the culvert.

Q. What measurements did you make there?

A. Taken a fifty-foot tapeline and measured up to the side of the rail, to the culvert where I had this mark on the rail.

Q. Could you still see at that time where the fire had burned?

[fol. 296] A. Yes. It was still visible where the fire had burned and the grass and weeds were still standing there and the weeds on ahead, where it hadn't been burned, there was a difference there where it had been burned and where it had not been burned at that point.

Q. What claim agent was that?

A. Mr. Hubbell.

Q. It wasn't Mr. Eckler here?

A. No, sir.

Q. Now, what measurement did you find? What was the distance between the culvert and—

A. (Interrupting) From the center of the culvert to where the torch was laying and the right-of-way had been burned, three hundred and sixty feet.

Q. Three hundred and sixty feet?

A. By tapeline.

Q. Is that direction north from the culvert?

A. North of the culvert.

Q. All right. Why, Mr. Howdeshell, on the 17th, did you have Mr. Rogers burning grass instead of helping with the ties?

A. I didn't feel he was physically able from his first injury to put him on ties.

Mr. Eagleton: I object to that because it is a conclusion.

Mr. Sommers: Well, it is the reason why.

The Witness: It was my responsibility.

[fol. 297] Mr. Eagleton: Wait just a minute. Let the Court rule.

The Court: His testimony awhile ago, I think, is sufficient basis for that question, as I recall.

Mr. Eagleton: I don't think his thinking about whether plaintiff was physically able or not—one layman can't pass on another.

Mr. Sommers: Of course, the question doesn't ask him for what his physical condition was; merely asked him why—

Mr. Eagleton: Go ahead.

Mr. Sommers: —he didn't have him pulling ties.

Mr. Eagleton: I withdraw the objection. Go ahead.

Mr. Sommers: Do you understand the question? Go ahead and answer.

The Witness: Ask it over. The question was why I didn't have him putting in ties?

By Mr. Sommers:

Q. Why did you have him burning grass instead of helping the rest of them?

A. I didn't think the boy was able to go out and pull ties. I didn't want to take a chance with the boy hurting his back until it was well.

Q. Was he doing any work previous to that time?

A. No, sir.

[fol. 298] Q. Any heavy work at all?

A. No, not at all; not a thing in the world from that time until this day.

Q. Did you hear him say that he had helped Healy put in ties?

A. Yes, sir.

Q. Did he do that?

A. No, sir.

Q. Do you remember that train coming by down there?

A. Yes, sir.

Q. What time of the day did that train come by?

A. It was a freight train. It is liable to go by—they don't run on schedule. They are liable to be a few minutes late. The best I remember it was between eight and nine o'clock—it was later than that. It was between nine and ten o'clock. They don't run on schedule, these freight trains, don't. The passengers do.

Q. Now, Mr. Howdeshell, after that freight train went by, about how long was it after that that Mr. Rogers came up and told you his back was hurting, if you can remember?

A. I didn't time it, but the boys had all gone back to work and been working a few minutes. I would say about twenty minutes before he came to me.

Q. The boys were already—

A. (Interrupting) The boys were already back to work.

Q. They had gotten off when the train went by?

[fol. 299] A. Yes. They cleared the track when the train come along.

Q. They were already back working on the ties?

A. Yes, sir.

Q. When Mr. Rogers came up to you did you see any singed hair or singed eyebrows on him?

A. I didn't.

Q. Did he say anything about fire getting on him?

A. Not fire getting on him. I believe he said smoke got in his face or something like that. I don't recall.

Q. When was it he said that to you?

A. No, he didn't. I withdraw that. He didn't say anything about no smoke or nothing in his eyes at that time.

Mr. Eagleton: You want that withdrawn?

A. His back was hurting him.

Q. When did he say that?

A. Talking to me in the station wagon down there.

Q. When he told you that the accident happened?

A. When he slipped and fell.

Q. Now, Mr. Howdeshell, are you familiar with that machine that they use to burn the right-of-way?

A. Yes, sir.

Q. How long has it been since that machine has been used?

A. It was late '49 or the early part—somewhere in '50; [fol. 300] I believe the early part of '50 the last time we operated that.

Q. Do they use it any more?

A. No, sir.

Q. Why did they quit using it? Let me ask you that, if you know.

A. It causes too much fire. It sets the right-of-way afire and drifted out in the adjoining property and burned up hay pastures and woodland.

Q. When the thing set fire what did the section crews have to do?

A. The section crew would have to follow along and put this fire out. It set the ties afire and set the right-of-way afire. It would spread, if you wasn't right there. If there was a wind it would spread on the engine.

Q. It was the section hands' duty to go and fight that fire?

A. We fought it.

Q. Now, since the latter part of 1949 or 1950 what was done with this machine?

A. It has been converted into a sprayer to poison the weeds and kill them.

Q. After that what is done to the weeds?

A. After it kills them they die down and we burn them off.

Q. How do you burn them off?

A. Well, use a torch, anything—I have used fire—most [fol. 301] of them use an old hand torch or something that is handy.

Q. Is that the way it has been done ever since that time?

A. Sure has.

Q. Do you have more or less fire since you have adopted that method?

A. We have a lot less fire.

Q. A lot less fire?

A. Yes.

Q. Does that cut down on the amount of fire fighting?

A. It sure did.

Q. Mr. Howdeshell, you say you have been on the section for thirty years. Is that right?

A. The 28th day of this month, yes, sir.

Q. Did you hear Mr. Rogers testify about a path they kept shoveled off for men to walk on?

A. Yes.

Q. Is there any such path on the railroad right-of-way that you know of?

A. I have never seen it.

Q. How about the culverts down there? Is there any path?

A. No pathway, no walkways on the culverts.

Q. This particular culvert, are you familiar with that?

A. Yes.

Q. How often do you go out by there?

A. Well, every time I go over my track I ride over [fol. 302] it. I patrol the track two or three times a week; sometimes every day.

Q. Do you work around there sometimes?

A. Sometimes we work around there, yes, sir.

Q. Is that culvert any different from any other culvert?

A. We have several culverts of the same make. The land is built up the width of the shoulder, of the dump, to hold the ballast, the same as the dump does, for the pur-



pose of holding your rock ballast in shape, just like the dump here does.

Q. Are there any of them you know of that have got a pathway that is kept shoveled up by the section crew?

A. No, sir.

Q. Any place on the railroad, you know about?

A. No, sir.

Mr. Sommers: I think that's all.

Cross-examination.

By Mr. Eagleton:

Q. Mr. Howdeshell, when a man is walking on the shoulder ballast, he is not walking on the ballast of the railroad? The ballast is under the ties and then it slopes down from the ties down to the shoulder; there is a level part there, isn't there?

A. Occasionally, Yes.

Q. Well, generally speaking?

[fol. 303] A. Generally speaking there is a shoulder there, just like on your highway.

Q. In other words, the shoulder, when we speak of that on a highway—sometimes you — signs, "Shoulder slippery when wet" or "Don't pull on shoulder," or something of that kind. You see those signs, don't you?

A. Yes.

Q. The shoulder is merely an extension of the regular highway. That is what you are talking about?

A. It is an extension of the dump.

Q. In this instance the shoulder is the level part that extends out from the dump. Is that correct?

A. That is correct.

Q. It extends out from the dump on which the ballast sits, about five or six feet, doesn't it?

A. No, sir; not all the way. I have got places on my track that don't stick out over eighteen inches.

Q. Well, say eighteen inches. You have got some other places where your shoulder is wider than that?

A. Yes.

Q. Three or four feet?

A. Yes, sir.

Q. At this particular place, both south and north of this particular culvert, the shoulder is, over and above the ballast, is about four feet wide, isn't it?

A. Approximately that; three or four feet wide.

[fol. 304] Q. Now, getting back to this machine that you used to use: Did you say—maybe I misunderstood you—did you say originally that one of the reasons you discontinued it was the cost of it?

A. No.

Mr. Sommers: He didn't say that.

A. I don't think I meant that.

By Mr. Eagleton:

Q. I misunderstood you. I asked Mr. Jones and he didn't hear it either. I thought you started by saying it cost too much.

A. No, I don't think so.

Q. How long had you used that machine in that way?

A. The original weed burner?

Q. Yes.

A. Since around about 1928 or '9.

Q. In other words, you used it for twenty years?

A. No, not quite.

Q. If you used it from 1928 or '29 until 1949—

A. Somewhere about that. I don't remember the exact year.

Q. You can regulate these sprays and shoot it any distance you want?

A. There is a limit to how far you can shoot it out.

Q. I didn't catch that.

A. There is a limit to how far.

Q. You can shoot them out to the maximum or you can shoot them out to less than maximum?

[fol. 305] A. As far as you can shoot them out at all would be approximately ten or twelve feet from the rail.

Q. Or anything less than that that you desire?

A. Yes; draw them in; work them in and out just like your fingers.

Q. A few minutes ago when Mr. Sommers was asking you questions about what the plaintiff said to you sitting

in the station wagon, about whether or not he had any heat on his face, you said you thought he said that smoke got in his face.

A. Well, that was said in the station wagon—is that your question?

Q. Yes.

A. He told me smoke got in his face and he slipped and fell. That was the first time, while he was in the station wagon, he ever mentioned it; about an hour after we had left the job.

Q. What did you mean awhile ago by saying you wanted to withdraw that statement? What did you mean by withdrawing it?

A. That was while we was up there at the motor car before we went to the doctor. He just told me he was hurt. That is what he told me.

Q. Oh, I get the point now. You are withdrawing the statement because he made it while sitting in the station wagon, at the doctor's office, rather than up at the motor car?

A. He didn't make no such statement at the motor car.

Q. He did make it in the station wagon?

[fol. 306] A. Yes; after we got to the depot an hour later.

Q. Did he say smoke and fire or just smoke? Do you remember that clearly?

A. Oh, I don't know. He said that train passed and smoke got in my eyes or something to that effect and I slipped and fell.

Q. Did he exclude the word "fire?"

A. I won't say.

Q. Your first impression, I think, was to load up or put him on the motor car?

A. Yes, sir.

Q. You would drive the motor car or some other man would drive it, or what?

A. I would have or one of the men.

Q. You would go with him?

A. Yes.

Q. That would make it three: The injured man, yourself and the driver. Is that right?

A. If you got the motor car out you are carrying plenty of help in case you meet a train to put it on or off.

Q. You have to put the car on?

A. You carry enough men to put the car on or off in case you meet a train.

Q. You first have to load it on or off, whatever the case may be?

A. Yes.

Mr. Eagleton: I believe that's all.

[fol. 307] Redirect examination.

By Mr. Sommers:

Q. This shoulder portion Mr. Eagleton inquired about, is that kept by the crew as a path or anything like that?

A. No, sir. We don't maintain no walk, no pathway up and down the track.

Q. Where do the men walk when you got to walk?

A. If we are going out to work we leave the tool house on the motor car.

Q. And you drive out to where you are going to work?

A. Drive the motor car to our destination or everywhere we are going to work; turn the motor car off and go to work and we just walk in—

Q. You don't understand me. That is when you go to work you take the motor car out to work, you drive to where you are going to work and work around in that area. Is that right?

A. Yes.

Q. Let's assume the occasion calls for a fellow to walk down the road a piece or something like that, either firing or some other purpose: Where are the places to walk?

A. You can walk on the rail or walk up on the ties. There is no particular place—

Q. On the gravel—

The Court: Let him answer.

Mr. Sommers: Pardon me.

[fol. 308] The Witness: There is no particular place for a man to walk. You just walk on the track or the shoulder. It is just a railroad; no walkways; no highways; it is just a railroad.

Q. It is just a railroad.

A. You walk on the track or you walk by the side of it or walk out in the right-of-way.

Q. Now, this shoulder: Is there any system whereby this gravel is shoveled out of there or anything like that?

A. No, sir.

Q. You said at this particular place the dump was four feet wide. Does that mean the shoulder?

A. The shoulder was probably three of four feet wide.

Q. Does the gravel get down off that—

A. Just about—

Q. I don't mean down off—what do you mean when you say it is four feet wide? Is that the dump that is four feet wide?

A. From your ballast edge down to what we call the shoulder of the dump.

Q. At other places it may not be that wide?

A. Lots of places it is not half that wide; narrower.

Q. As to this culvert: Is there ever any walkway kept across a culvert?

[fol. 309] A. Not in my thirty years of railroading.

Mr. Sommers: That's all.

Recross-examination.

By Mr. Eagleton:

Q. Just so we understand this. You are talking about a shoulder. That is the level portion of the roadbed there, and the ballast comes from the ties, in this instance from the west end of the ties over to the west edge of the ballast, and then the rest of the shoulder, four or five feet, is level at that place?

A. At that particular place possibly three to four feet.

Q. There is no ballast on that shoulder?

A. Not any more unless there would be loose rock kicked out.

Q. There is no point in letting the ballast reach out to the shoulder?

A. We don't maintain it that way.

Q. You try to maintain the shoulder free from ballast?

A. We keep it lined up.



Q. You can use any word you want to, either "maintained" or "lined up." What you try to do is keep your ballast—can I use this?

A. Come up here and use this (indicating).

Q. If the ballast ran out here in this discretion, it falls [fol. 310] down at an angle downward and your track is up here. This white represents the ballast (illustrating)?

A. Yes.

Q. Then it runs out to the shoulder which is west of the tracks four or five feet. Is that right?

A. Three to four feet.

Q. This thing we are talking about is the shoulder (illustrating)?

A. Yes, sir.

Q. If this place was three or four feet wide, you don't let the ballast run over it, do you?

A. With vibration it will roll down there. We don't pick it up. We don't maintain that in particular. If the rock rolls down, it rolls down there.

Q. What would you say to your men, as a section foreman, if you came along a place and the ballast had rolled all over this shoulder so the shoulder was no longer there and it was encroached upon by this ballast to a considerable amount—not just a loose rock or two—you would tell them to keep your edge in line, to edge it up?

Mr. Sommers: Let him answer. I object to that. He is asking a question and answering it.

Mr. Eagleton: This is cross-examination.

Mr. Sommers: You can't ask a question and answer it. Ask him the question and let him answer.

By Mr. Eagleton:

[fol. 311] Q. When you said awhile ago, you said you kept your edge lined up. By that you meant you kept the edge of this ballast lined up straight, didn't you, as straight as you can?

A. Approximately.

Q. I don't mean to say that you put a level on it.

A. Now, wait. It is almost—we don't put an edge on it, you see, or a board on it, but it is almost straight.

Q. Just like if you are up in an airplane, looking down

A. It wouldn't be quite that straight.

Q. Wait a minute. You haven't got what I want to say. If you go up in an airplane and you look down and see rows of plants on a farm, they look pretty straight; you can see all the rows right along.

A. We try to maintain our ballast on a straight line.

Q. On a straight line. That would be, in this instance, from the east end of the shoulder back to the railroad ties. Is that it?

A. Yes, sir.

Q. The shoulder is on the west side and the shoulder runs north and south, doesn't it?

A. Yes, sir.

Q. It is three or four feet wide? Is that right?

A. Three or four feet wide—

Q. That is the west edge.

The Court: Let him answer.

By Mr. Eagleton:

Q. Is that correct?

[fol. 312] A. Three or four foot wide at that particular place.

Q. And south of that culvert?

A. It is.

Q. Now, I am talking about that shoulder, if it runs north and south and it is three to four feet wide—that is about this distance here (indicating)—it has a west edge of the shoulder and an east edge of the shoulder, doesn't it?

A. The east edge of the shoulder is on the opposite side of the other track.

Q. No. That is the east shoulder; that is the shoulder on the other side. I am talking about this shoulder that is four feet wide. It has to be four feet wide from east to west, doesn't it?

A. From the ballast edge to the edge of your shoulder, yes, if that is what you are talking about.

Q. The ballast edge, in this instance, is on the east edge of that shoulder. Do I make myself clear?

A. The ballast is on the east side—the west side of the shoulder.

Q. I don't think that is true.

A. Oh, yes.

Q. The shoulder runs north and south?

A. Yes.

Q. And the ballast edge is on the east side of that shoulder, isn't it?

A. It is on the west side of the track, and your shoulder [fol. 313] extends out three or four foot beyond the ballast edge on the same side of the track.

Q. I think we have got the same thing in mind, but this is the record the stenographer makes and I want to make sure he has got it correct. The shoulder is three or four feet wide. The only shoulder I am talking about in this particular instance is the one that is west of the tracks, near this culvert.

A. That's right.

Q. But the ballast only comes down to the east edge of the shoulder. Is that right? That is correct, isn't it?

A. Why?

Q. That is what I thought you said. Is that correct?

A. The ballast comes down on the east side of your track, also, to the shoulder. Then your shoulder extends three or four feet.

Q. Beyond that?

A. In the same direction.

Q. To the west of it. Is that right?

A. Absolutely. That is what I was talking about.

Mr. Eagleton: That's all.

Further re-direct examination.

By Mr. Sommers:

Q. Do you ever go along, Mr. Howdeshell, and do any shoveling just to throw chat or gravel back up in there?

A. No, sir, except—

Q. I take it when you pull ties out there you try to [fol. 314] shovel or you do some shoveling?

A. When we do a day's work and disturb the rock we dress it back up like it was before we started.

Q. Do you ever call out the detail to go along and shovel off this shoulder so it will be clean to walk on?

A. No.

Mr. Sommers: I have got a picture here. You may object to it.

The Court: Let me ask you this—

Mr. Sommers: That is the east shoulder.

Mr. Eagleton: It is the east side?

Mr. Sommers: Let me ask him about this. Mark this as an exhibit.

(Photograph marked by the Reporter as Defendant's Exhibit O.)

The Court: I would like to ask the witness a question.

Mr. Sommers: Go ahead, Your Honor.

The Court:

Q. In your thinking, Mr. Witness, on the west side of the track, for example, does the shoulder come up to the end of the ties or up to the rail?

A. Your Honor, the shoulder is the foundation on which the ballast is placed; on which the ties is placed, and then the rail. The shoulder is the earth embankment on which [fol 315] the track is built on.

Q. In other words, there is ballast between the ties?

A. Yes, sir. You lay your ties and distribute the ballast on it. That is the way we maintain it, on rock ballast.

Q. The rock ballast is the support for the ties? And this ballast extends out between the ties and sometimes beyond the ties?

A. About twenty, about thirty inches on an average beyond the ties; eighteen to thirty inches.

Q. On the west side, for example, where does the shoulder begin? At the rail or the end of the ties?

A. At the edge of the ballast.

Q. At the end of the ties?

A. At the edge of the ballast.

Q. The edge of the ballast. The ballast sometimes comes out beyond the ties?

A. Yes.

The Court: All right.

By Mr. Sommers:

Q. I will hand you Mr. Howdeshell, a photograph here which has been marked Defendant's Exhibit O and that is a photograph, I believe, looking south on the east rail and ask you if that does represent the east rail?

Mr. Eagleton: If the Court please, I object to the picture because it is no effort to show the conditions that the witness said were present on the west side and could only cause confusion. That is over on the other side of the track, admittedly.

Mr. Sommers: I will admit that. Let me see if I can tie it in and maybe it will remove your objection. If it is improper I am not going to push it.

By Mr. Sommers:

Q. And that shows the other side there?

A. Yes, sir.

Q. Are both sides the same? Would that look like the other side or not?

A. It is practically the same condition on both sides of the railroad.

Q. The other side is over here; it isn't a good view. Isn't that right?

A. Yes, sir.

Q. You say the other side looks just like this here?

A. It is about the same condition on both sides of the rail right at this location.

Mr. Sommers: Under that condition, I will offer it.

Mr. Eagleton: I object to it as being a picture taken at the opposite side. It doesn't purport to show the condition on the west side.

Mr. Sommers: Well, he said it would be the same. That is the reason I am offering it. I am not going to push it any. It is the only one I have.

[fol. 317] The Court: Has there been any material change in the railroad track since the accident?

Mr. Sommers: If Your Honor please, this photograph was taken on July 23rd, 1951.

The Court: I see. All right. It is admitted.

Mr. Sommers: I would like to pass it to the jury.



By Mr. Sommers:

Q. In all fairness, I want the jury to understand that is the east side. The accident happened over here on the west side, which the witness said would be about the same.

The Court: Is that all with this witness?

Mr. Eagleton: We are waiting for the jury to look at the exhibits.

Mr. Sommers: Well, I think that is all.

Further Recross-Examination.

By Mr. Eagleton:

Q. Mr. Howdeshell, I want to make sure I have got this thing fairly straight. This is a crude thing here (exhibiting sketch to witness). The rails are up here, you understand?

A. Yes.

Q. This is your roadbed with the ties underneath the rail. Is that correct? The ties are underneath the rails, of course. Is that right?

A. Yes. Your ties are under the rails.

[fol. 318] Q. There is a sloping-down from there as indicated by this line and that is filled with ballast, coming out from under the ties?

A. That is your tie. This is your rail. This is your ballast and this is your shoulder (indicating).

Q. In other words, from here to here, S to S is the shoulder right in there? That is the shoulder right in there where I marked it?

A. From this out.

Q. From this out?

The Court: You mean the shoulder is beyond the ballast?  
The Witness: Yes.

By Mr. Eagleton:

Q. The shoulder is about three or four feet beyond the ballast and this represents—I will put a B on there. That is the ballast. I will let it go at that. This line going down here is the ballast, with the B on it?

A. Yes.

Q. This part extends out beyond the ballast?

A. Yes.

Q. Whenever you find your ballast is slipping away because of the angle on which it is placed and getting on here, when your men go by, if they are assigned to that particular job, they dress it up and get it back up there again, get your ballast up off the shoulder?

[fol. 319] A. I haven't had no occasion to do that.

Q. The reason you have not had any occasion to do it, then, is your ballast is put in quite firmly so it will stick, isn't it?

A. It is put in there and it don't vibrate down unless—well, the rock will roll down.

Q. If it does in any considerable quantity, someone will call your attention to it?

A. Well, if you have a slide or something like that.

Q. You clean it out?

A. Sure, we clean it up if we have a slide.

Mr. Sommers:

Q. Does it get flat-ened down like it is represented here? Is that the usual way the ballast looks out there?

A. That is just about the way the ballast is maintained.

Q. Well, it isn't a sharp incline or anything like he has drawn on this diagram?

A. It ain't as sharp as he has got there.

Q. In other words, you build up a dump, don't you, when you are making a railroad?

A. Yes.

Q. That is a mound of dirt that is higher than the rest of the ground surrounding it. Is that right?

[fol. 320] A. Yes.

Q. On top of that you throw the ballast, gravel. Is that right?

A. Yes.

Q. On top of that you lay the tracks. Is that right?

A. Lay your ties on top of your ballast and lay your rail on top of the ties.

Q. Do you fellows ever do anything further with it except when you are removing a tie?

A. No.

Q. So it will mash down and look like this all the time. Is that right?

A. Yes.

Q. Regardless of where one ends and the other begins, this is a representation of what a railroad right-of-way looks like?

A. Yes. That is a general view of the railroad.

Mr. Sommers: That's all.

Mr. Eagleton: Mark this as a Plaintiff's Exhibit.

(Document marked by the Reporter as Plaintiff's Exhibit 12.)

By Mr. Eagleton:

Q. You are talking, you say the incline may not be sharp—I am not trying to be an engineer—but this drop from your ties down—

A. (Interrupting) It don't drop that sharp.

Q. It drops about a thirty-degree angle, doesn't it? [fol. 321] A. Something like that.

Q. It drops down a distance of about two feet in about six. Is that right?

A. Yes; something like that, yes, sir.

By Mr. Sommers:

You mean it does go out six feet? Is that right?

Mr. Eagleton: Wait a minute.

The Witness: The ballast don't go six feet from the tie.

Mr. Sommers: Let me see this exhibit.

By Mr. Sommers:

Q. It doesn't look like that on the picture, does it?

A. It don't drop as fast as that does.

Q. It don't drop anything like that?

A. No.

Mr. Sommers: That's all.

By Mr. Eagleton:

Q. It drops 'that thirty degrees; that means two feet in a distance of six feet, down to the shoulder?

A. No, not no six feet to the shoulder.

Q. Six feet back? In other words, in a distance of six feet back you drop about two feet down to the shoulder, which is three or four feet wide. Is that right?

A. Your ballast?

Q. Yes.

A. No. Your ballast is about thirty inches from your [fol. 322] shoulder.

Q. In that thirty inches how far does it drop before it gets to the level part of the shoulder, the four-foot part of the shoulder?

A. The ballast line is approximately eighteen or nineteen inches below your rail.

Q. It drops down eighteen inches to the east edge of the shoulder?

A. Yes, to the edge of the shoulder, regardless of which side it is on.

Mr. Eagleton: That's all.

By Mr. Sommers:

Q. It goes out to the edge at places. Is that right?

A. Your ball-st runs from your rail out under your ties. The ties is within eighteen inches, that is standard, from your rail. Your ball-st runs down—I don't know exactly what angle.

Q. You never measured that?

A. Approximately thirty inches from your rail to your gravel or your ballast edge out there.

Q. You are not an engineer; you never measured that?

A. No.

Q. Have you ever measured that degree or anything like that?

A. It is approximately thirty inches.

Q. I am not talking about inches.

[fol. 323] A. I don't know the degree.

Q. You are not an engineer?

A. I am not an engineer.

Mr. Sommers: That's all.

By Mr. Eagleton:

Q. Aside from not being an engineer and not knowing angles, you do know the ballast only runs from the rail down to the shoulder, a distance of about thirty inches. Is that right?

A. Yes.

Q. And then the shoulder begins where the ballast ends and runs about four feet beyond. Is that correct?

A. At this particular point, three or four feet.

Mr. Eagleton: All right. That's all.

Mr. Sommers: That's all.

The Court: Just a minute. Let me have that picture. In this picture, Defendant's Exhibit O, on the left side you see a lot of rocks, apparently rocks, to the west of the ties. Doesn't this picture show what you call the "shoulder" is covered with rocks, ballast?

The Witness: Your Honor, that shoulder extends out beyond this (indicating). Here is your gravel edge, rock edge here. Your shoulder extends on out here.

The Court: All right. It is time for our afternoon [fol. 324] recess.

(At this point there was a brief recess after which the trial was resumed.)

ROBERT LEON SERATT, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Sommers:

Q. Will you tell the jury your name, please?

A. Robert Leon Seratt.

Q. How old are you?

A. Thirty-five.

Q. Where do you live?

A. McRae, Arkansas.

Q. Are you married?

A. Yes.

Q. Where do you work?



A. Searcy Glass & Paint Company, Searcy, Arkansas.

Q. Where did you work before you worked there?

A. White County Glass Company, Searcy, Arkansas.

Q. What kind of work did you do at the glass company?

A. I am a glaz-er.

Q. Did you at one time work for the Missouri Pacific Railroad?

A. I did.

Q. When was that?

A. I started May 21st or 23rd, 1951 and quit the 30th of March, 1952.

Q. The 30th of March, 1952. You say you started May 21st or the 23rd?

[fol. 325] A. I don't remember. It was on Monday, whichever was on Monday of that week.

Q. Was that the same day Mr. Rogers started work?

A. The same day.

Q. You started to work together? Is that right?

A. Yes.

Q. Did you work all the time that he worked there?

A. Yes, sir.

Q. Were you on the same section?

A. Yes, sir.

Q. Were you a part of the crew all the time he was there?

A. Yes, sir.

Q. Had you known Mr. Rogers prior to that time?

A. No, sir, I did not.

[fol. 326] Q. Do you know anything about an accident to him on July 17th?

A. No, sir, I do not.

Q. What were you doing that day?

A. Putting in ties.

Q. What was he doing?

A. He was burning the right-of-way.

Q. What was the first thing you knew or what happened there in regard to Mr. Rogers, if you recall?

[fol. 327] A. About all I can say happened, the best way, would be he walked up the track. I saw him going to a car. My partner and I were quite a ways from the rest of the gang working, but they was going to a car.

Q. You didn't have anything to do with loading the motor car or anything like that?

A. No. Mr. Howdeshell hollered out for us to load the motor car. Then he said, "Go ahead with your work." He changed his mind.

Q. Did Mr. Rogers ever tell you, either at that time or later on, that he had ~~fallen on the ballast~~ or fallen on the culvert out there?

A. No, he didn't.

Q. Where did you hear that he had slipped on the ballast from?

A. Mr. Howdeshell.

Q. What did you hear about the culvert being involved?

A. I believe it was on the following Sunday when a lawyer—I believe the man's name was Roth—and a fellow by the name of Morris came to my house for a statement.

Q. Wesley Morris, is that who it was?

A. Yes.

Q. Did they mention to you the culvert was involved?

A. Yes.

Q. Was the *the* first you knew about the—

[fol. 328]. A. (Interrupting.) I believe it was, yes.

Q. Did you know where Mr. Rogers' torch was after he left that day?

A. Yes, sir, I do. I picked it up.

Q. You picked it up?

A. Yes.

Q. Where in relation to the culvert was that torch?

A. Well, I would say between three and four poles from the culvert. That is the way we measure the ground there. That would be the only way I could say or how I would judge the distance.

Q. When was that measurement made? Do you recall?

A. Well, that day it was just more or less an estimate, you know. We just knew how many poles it was to the culvert. I said culvert—well, we will say from where Mr. Howdeshell told me he got hurt. When you are putting in ties you don't gain but very little ground. It would be mighty easy to remember where you were. This torch was, I will say, not over thirty or forty feet from where I was working.

Q. From where you were working?

A. Yes.

Q. How far north of that culvert were you working?

A. Well, I would have been in the same pole range, between three and four hundred feet.

Q. How long is a pole?

A. Around a hundred feet—that is the distance between them.

[fol. 329] Q. Between the poles?

A. Yes.

Q. It was about a hundred feet between the poles?

A. I would say that.

Q. When you speak of a pole-length, is that between two telephone poles?

A. That's right. That is the way the mileage is numbered on the railroad.

Q. Now, do you know about that culvert that is down there?

A. Yes, sir.

Q. Have you worked around down there?

A. Yes, sir.

Q. Will you tell us whether or not there is any path maintained across that culvert?

A. No, sir, there is no path.

Q. Is there any path maintained across any culvert?

A. Not that I ever saw.

Q. Do you know of any path that is maintained by the section men for them to walk over?

A. I do not.

Q. Or any place on the right-of-way you ever worked?

A. No, sir.

Q. Have you burned weeds around there, been assigned to burning weeds?

A. Yes.

Q. How did you do it?

A. With a little torch by hand or pulling the grass or [fol. 330] throwing down matches or whichever way you wish.

Q. Do you know of any effort that is made to keep the gravel off the shoulder, or anything like that?

A. No, sir, I do not.

Q. Is the shoulder maintained for the purpose of men walking on?

A. No.

Q. I presume you can walk on there if you want to?

A. You can walk on there.

Mr. Sommers: That's all.

Cross-examination.

• By Mr. Eagleton:

Q. That is where most men do walk in coming up and down the right-of-way; if you are walking, you walk on the shoulder?

A. I believe, I would say while I was there I walked between the tracks most of the time.

Q. If your work was up on the dump or you were working on the rails, you would walk in between the tracks?

A. Yes.

Q. It depends on the place you are working out there?

A. Yes.

Q. When taking your motor car off you put it down on the shoulder?

A. Yes.

Q. The shoulder is lower than the rails, isn't it?

A. Yes, sir.

[fol. 331] Q. It is lower than the ties?

A. Yes, sir.

Mr. Eagleton: I believe that's all.

Mr. Sommers: That's all. Thank you.

The Court:

Q. I would like to ask you what you think is the shoulder.

A. Well, I would think that the shoulder would be where the ballast ends, from there to the edge of the dump.

Q. What is the dump?

A. That would be the whole roadbed under both rails, or one rail, whatever you would have.

The Court.: All right.

### Redirect examination.

By Mr. Sommers:

Q. Is this exhibit here, is that the way the right-of-way looks there (handing photograph to witness)?

A. Yes, it does.

Q. That is the way it looks all the time down there?

A. It did when I was there. I haven't been on the track to see it it will soon be three years.

Q. Are you connected with the Missouri Pacific in any way at this time?

A. I am not.

Mr. Sommers: That's all.

### Recross-examination.

By Mr. Eagleton:

Q. Mr. Seratt, the way this picture is taken, focused, this [fol. 332] is east side over here and you can hardly see the right-hand side of that shoulder at all, can you?

A. That's right.

Mr. Eagleton: That's all.

### Further redirect examination.

By Mr. Sommers:

Q. Did the right side look about like the left side there? Would it be about the same comparable situation, or what is the situation?

A. I would say along here, by knowing that like I do, that was a mud track through there, but we had dug out this dirt to the edge of these ties or this ballast—the edge of these ties, where that would drain. This over here is scattered out at random.

Q. It would be about the same on the other side?

A. No; I don't think it had it dug out on the other side.

Q. This has been dug here?

A. Yes, on the left. That there, it looks like there is more gravel than there is over here. That other, it was put up



by machine. There is no mud there yet, so it is still in better shape, but it wasn't ~~maintained~~.

The Court: Do you know whether this picture shows the location of the culvert or not?

A. I don't know whether I could—no, sir, I don't believe [fols. 333-415] this picture would show the culvert. I think the culvert would be further north. I think this is looking south. I don't believe the culvert would be shown here.

The Court: Is that stepladder on that picture, does that indicate anything?

A. It could be, that could be a drain there. I don't know. It wouldn't to me.

The Court: That's all.

Mr. Eagleton: That's all.

Mr. Sommers: At this time that is all the live witnesses I have got today.

The Court: All right.

Mr. Sommers: I have got a deposition.

Mr. Eagleton: If the Court please, Mr. Sommers indicated he is going to bring a doctor in in the morning and inasmuch as we have to go until tomorrow, if it is all right with Your Honor—it is pretty hot and sticky and I would just as soon as quit now as four o'clock.

(Thereupon the trial of the above entitled cause was laid over to the next day, April 15th, 1954.)

On April 15th, 1954 at 10:00 o'clock A. M. the trial of the above entitled cause was resumed.

The Court: You may proceed.

[fol. 416] Thereupon the trial was resumed in the courtroom in the presence and hearing of the jury and the following further proceedings were had:

Mr. Eagleton: Plaintiff wants to show the formal offering of the exhibits that were introduced in the plaintiff's case, that is, all of them. There were some introduced after we got into defendant's case. I think they were numbered 1 through 12.

Mr. Sommers: There is no sur-rebuttal on the part of

the defendant. I would like to ask leave and I do ask leave to reopen my case for the sole purpose of offering the exhibits which we have introduced in the case, Your Honor.

The Court: Very well. They may be introduced.

Mr. Sommers; I think I have offered them in evidence.

Mr. Eagleton: The plaintiff will rest.

Mr. Sommers: Defendant will rest.

The Court: All right. Gentlemen of the jury, the next step in the proceeding is the preparation of the instructions.

(At this point there was a recess.)

The following proceedings were had outside the hearing [fol. 417] of the jury in the Judge's Chambers:

#### RULING ON MOTION FOR DIRECTED VERDICT

The Court: Gentlemen, I have overruled, at the close of all the evidence, defendant's motion for a directed verdict.

#### MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL OF THE EVIDENCE

Comes now Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, the defendant herein, and at the close of all the evidence in the case, moves the Court to direct a verdict in favor of the defendant for the following reasons:

1. Under the law, the pleadings, and the evidence there is no submissible jury issue in the case and, under the law and the pleadings, the evidence is not sufficient to make a jury issue or a jury question;

2. Under the law and the pleadings, the evidence on behalf of plaintiff does not give rise to a cause of action against this defendant;

3. The evidence does not raise a question of fact as to any negligent act or omission on the part of this defendant, his agents, his servants or his employees;

5. The evidence on behalf of plaintiff fails to establish any act of negligence on the part of this defendant, his agents, servants or employees which caused or contributed to cause plaintiff's injuries, if any;

[fol. 418] 6. The evidence on behalf of plaintiff affirma-

tively establishes that there was no act of negligence on behalf of defendant, his agents, servants or employees, particularly no act of negligence as pleaded in plaintiff's petition, which caused or contributed to cause plaintiff's injuries, if any;

7. The plaintiff has failed to sustain the burden of proof of the issues raised in his petition;

8. Under the law, the pleadings and the evidence, the defendant is entitled to a directed verdict in his favor.

9. The evidence does not preponderate in favor of the plaintiff.

10. The weight of the evidence is in favor of the defendant.

Respectfully submitted. .

(Filed April 15, 1954). .

The Court: I have before me instructions A and B which have been offered on behalf of the defendant. These instructions I am refusing.

I have before me Instructions 1 to 8, both inclusive, which I expect to give and read to the jury.

Instructions 1 and 6 are offered on behalf of the plaintiff. Numbers 2, 3, 4, 5 and 7 are offered by the defendant. Number 8 is given by the Court. You may make your [fol. 419] objections and exceptions now, Gentlemen.

#### EXCEPTIONS TO INSTRUCTIONS

Mr. Eagleton: Plaintiff excepts to the giving of the instructions that were offered by the defendant and given by the Court as indicated heretofore. They are Instructions numbers 2, 3, 4, 5 and 7.

Mr. Sommers: Defendant objects and excepts to the action of the Court in overruling defendant's motion for a directed verdict at the close of all the evidence.

Defendant further objects and excepts to the action of the Court in refusing to give Instructions A and B offered on behalf of the defendant.

Defendant further objects and excepts to the action of the Court in giving Instructions 1 and 6 on behalf of the plaintiff and to each and every other instruction given on behalf of the plaintiff.

Thereupon the trial was resumed in the presence and hearing of the jury.

## INSTRUCTIONS GIVEN

### Instruction No. 1

The Court instructs the jury that under the law applicable to this case, it was the positive, non-delegable and continuing duty of the defendant to exercise ordinary care to furnish the plaintiff a reasonably safe place in which to work.

[fol. 420] In this connection, the Court instructs the jury that if you find and believe from the evidence that on the 17th day of July, 1951, the plaintiff, while acting within the scope and course of his employment for the defendant, was engaged in burning weeds using a hand torch along the defendant's right-of-way, a short distance north of "Garner Crossing" near the City of Garner, State of Arkansas, and that while so doing, if you do so find, plaintiff was required to work at a place in close proximity to defendant's railroad tracks whereon defendant operated its trains, and if you further find that on the occasion in question, while one of defendant's trains was passing the place where plaintiff was working, as aforesaid, it did cause fire from said burning weeds and smoke therefrom to come dangerously close to plaintiff and that plaintiff, in the exercise of ordinary care for his own safety, if you do so find, was required to retreat and move quickly away from said danger to the culvert mentioned in evidence and to use said culvert as his place of work, which said place was covered with loose and sloping gravel, if you so find, and which said place did not provide adequate or sufficient footing for plaintiff to thus move or stand under said circumstances; and if you further find under all the facts aforesaid, if you find them to be the facts, that the method of doing said work and the place of work thus provided by the defendant was unsafe and dangerous and not reasonably safe and that the defendant in thus adopting said method and if you do so find, and in providing said place of work, if you do so find, did fail to exercise ordinary care and was guilty of negligence, and that as a direct and proximate result thereof, if you do so find,

the plaintiff was caused to fall and to be injured thereby, then your verdict must be in favor of the plaintiff and against the defendant herein.

### Instruction No. 2

The Court instructs the jury that under the law applicable to this case it was the duty of the plaintiff to exercise ordinary care for his own safety, at all times, while performing his duties as an employee of the defendant.

In this connection, the Court instructs the jury that if you find and believe from the evidence that on July 17, 1951 the plaintiff, James C. Rogers, while an employee of the defendant and while burning weeds on a portion of defendant's right-of-way near "Garner Crossing" near the City of Garner, Arkansas, did move about on said railroad right-of-way with his arm over his eyes, and did move backwards and sideways without looking in the direction in which he was walking, and if you further find that under the circumstances mentioned in the evidence the plaintiff, in exercising ordinary care for his own safety, could have and should have looked in the direction in which he was [fol. 422] walking, but failed to do so and, if you further find that the plaintiff in failing to do so did not exercise ordinary care for his own safety and was guilty of negligence and that such negligence, if any, was the sole proximate cause of his injuries, if any, and that such alleged injuries, if any, were not directly contributed to or caused by any negligence of the defendant in any of the particulars submitted to you in other instructions herein, then, in that event, the plaintiff is not entitled to recover against the defendant, and you will find your verdict in favor of the defendant.

### Instruction No. 3

The Court instructs the jury that the charge laid by the plaintiff against the defendant in this case is one of negligence. Negligence is not in law presumed and a recovery may not be had on a charge of negligence except where such charge is sustained by the preponderance, that is, the greater weight of the credible evidence. But it does not devolve upon the defendant in this case to disprove said charge, but rather the law casts the burden of the proof of



said charge upon the plaintiff, and said charge of negligence must be sustained by the preponderance, that is, the greater weight of the credible evidence. If, therefore, you find and believe the evidence touching the charge of negligence against the defendant as submitted in these instructions [fol. 423] does not preponderate in favor of the plaintiff, then the plaintiff is not entitled to recover against the defendant and your verdict must be for the defendant.

#### Instruction No. 4

The Court instructs the jury that the mere fact of itself that plaintiff was injured and has brought suit claiming defendant was negligent is no evidence whatever that the said defendant was in fact negligent. Negligence is not in law presumed, but must be established by proof as explained in other instructions. Neither are you permitted to base a verdict entirely and exclusively on mere surmise, guesswork and speculation; and if upon the whole evidence in the case, fairly considered, you are not able to make a finding that defendant was negligent without resorting to surmise, guesswork and speculation outside of and beyond the scope of the evidence; and the reasonable inference deductible therefrom, then it is your duty to, and you must, return a verdict for the defendant.

#### Instruction No. 5

The jury are instructed that you are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight you may take into consideration his or her manner on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling towards the parties to the suit, the probability or improbability of his or her statements, as well as all the other facts and circumstances given in evidence.

#### Instruction No. 6

The Court instructs the jury that if you find in favor of the plaintiff under the evidence and other instructions of the Court, then in assessing his damages you will award him such sum as you find and believe from the evidence

will fairly and reasonably compensate him for the injuries he sustained on the occasion in question, and in arriving at the amount of your verdict you may take into consideration such pain and suffering, if any, as you may find and believe from the evidence plaintiff has suffered by reason and on direct account of said injuries and such pain and suffering, if any, as you may find and believe from the evidence plaintiff is reasonably certain to suffer in the future by reason and on direct account of said injuries, and you may also take into consideration such loss of earnings, if any, not to exceed the sum of \$215 per month, as you may find and believe from the evidence plaintiff has suffered on direct account of said injuries and such loss of earnings, if any, not to exceed the sum of \$215 per month, as you may find and believe from the evidence plaintiff is [fol. 425] reasonably certain to suffer in the future by reason and on direct account of said injuries.

#### Instruction No. 7

The Court instructs the jury that in this case the plaintiff is seeking to recover for injuries alleged to have been sustained on July 17, 1951. In no event are you to award him any damages for any condition of injury or ill health, if any, which he may have had or may have sustained before said date of July 17, 1951.

#### Instruction No. 8

The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which event all of the jurors who concur in such verdict shall sign the same.

If, however, all of the jurors concur in a verdict, your foreman alone may sign it.

#### INSTRUCTIONS REFUSED

#### Instruction No. A

The Court instructs the jury that, under the law, pleadings and the evidence at the close of plaintiff's case, plain-

tiff is not entitled to recover and your verdict should be for the defendant.

[fol. 426]                      Instruction No. B

The Court instructs the jury that in this case the plaintiff is seeking to recover for injuries alleged to have been sustained on July 17, 1951. In no event are you to award him any damages for any condition of injury or ill health, if any, which he may have had or may have sustained before said date of July 17, 1951 or for any aggravation of such condition of injury or ill health, if any.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

VERDICT—April 15, 1954

“We, the jury in the above cause, find in favor of the plaintiff on the issues herein joined and assess his damages at the sum of \$40,000.00.”

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

JUDGMENT—April 15, 1954

WHEREFORE, it is considered and adjudged by the Court that the Plaintiff have and recover of the Defendant the sum of Forty Thousand (\$40,000.00) Dollars, together with the costs of this proceeding and that execution issue therefor.

[fol. 427] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT AND TO ENTER JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL—Filed April 26, 1954

Defendant, having moved for a directed verdict in his favor at the close of all of the evidence in the above case, now moves the Court to set aside the verdict and judgment rendered against him, and to enter judgment in his favor

in accordance with his said motion for a directed verdict because:

1. Defendant's motion for a directed verdict should have been sustained.

2. Under the law, the pleadings and the evidence there, was no submissible jury issue in the case and, under the law and the pleadings, the evidence was not sufficient to make a jury issue or a jury question.

3. Under the law and the pleadings, the evidence on behalf of plaintiff does not give rise to a cause of action against this defendant.

4. The evidence does not raise a question of fact as to any negligent act or omission on the part of this defendant, his agents, servants or employees.

5. The evidence of the plaintiff and all of the evidence in the case affirmatively establishes that there was no act or omission constituting negligence on the part of this [fol. 428] defendant, his agents, servants or his employees.

6. The evidence of plaintiff and all of the evidence in the case fails to establish any act or omission constituting negligence on the part of this defendant, his agents, servants or employees which caused or contributed to cause plaintiff's alleged injuries.

7. The evidence on behalf of plaintiff and all of the evidence in the case affirmatively establishes that there was no act nor omission constituting negligence on behalf of defendant, his agents, servants or employees, particularly no act nor omission constituting negligence as pleaded in plaintiff's petition, which caused or contributed to plaintiff's injuries.

8. The plaintiff failed to sustain the burden of proving the issues raised in his pleadings.

9. The specific acts of negligence pleaded in plaintiff's petition were not proved, but were rather disproved by plaintiff's own evidence and by all of the evidence in the case to have caused or contributed to plaintiff's injuries.

10. Under the law, the pleadings and the evidence defendant is entitled to have the verdict and judgment set aside and to have a directed verdict and judgment entered in his favor.

[fol. 429] In the alternative defendant moves the Court

to set aside the verdict and judgment against him and to grant him a new trial herein in the event his foregoing motion for judgment, in accordance with his motion for a directed verdict is not sustained because:

A. Defendant incorporates here by reference the reasons numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10 herein above stated in support of defendant's motion for judgment in accordance with his motion for a directed verdict.

B. The Court erred in denying defendant's motion for a directed verdict at the close of all of the evidence submitted on behalf of plaintiff.

C. The Court erred in denying the defendant's motion for a directed verdict at the close of all of the evidence.

D. The Court erred in admitting incompetent, immaterial and illegal evidence offered by the plaintiff and erred in overruling objections of defendant to such evidence.

E. The Court erred in excluding proper, competent and material evidence offered by the defendant.

F. The Court erred in giving Instructions 1 & 6 on behalf of plaintiff and erred in giving each and every other Instruction on behalf of plaintiff.

G. The Court erred in refusing to give Instruction A & B [fol. 430] on behalf of the defendant.

H. The verdict is for the wrong party.

I. The verdict is against the greater weight of the evidence.

J. The verdict was excessive.

K. The verdict was so excessive that it indicates it was the result of bias, prejudice and passion on the part of the jury.

L. The jury returned an improper verdict.

M. The Court rendered judgment improperly on the verdict as returned by the jury.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

DEFENDANT'S MOTION TO SET ASIDE THE VERDICT, ETC. ARGUED  
AND SUBMITTED.—May 21, 1954

Thereafter, on the 21st day of May, 1954, Defendant's Motion to set aside the verdict and judgment and to enter judgment in accordance with Defendant's Motion for a



Directed Verdict or in the alternative for a new trial, was argued and submitted.

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[fol. 431] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS  
 DEFENDANT'S MOTION TO SET ASIDE VERDICT, ETC., OVER-  
 RULED—July 26, 1954

Thereafter, on the 26th day of July, 1954, Defendant's Motion to set aside the verdict and judgment and to enter a judgment in accordance with Defendant's Motion for a Directed Verdict or in the alternative for a new trial was by the Court Overruled.

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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

NOTICE OF APPEAL—Filed August 10, 1954

Notice hereby given that Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, Defendant above named, hereby appeals to the Supreme Court of Missouri from the judgment entered in this action on the 16th day of April, 1954, and from the Court's action on July 26, 1954, in overruling Defendant's After-Trial motion for judgment or for a new trial.

CLERK'S CERTIFICATE OF MAILING OF NOTICE OF APPEAL  
 (Omitted in Printing)

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[fol. 432] TIME TO FILE TRANSCRIPT EXTENDED (Omitted in Printing)

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[fol. 433] TRANSCRIPT APPROVED (Omitted in Printing)

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[fol. 434-436] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 437] IN SUPREME COURT OF MISSOURI

No. 44,595

JAMES C. ROGERS, Respondent,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Appellant

ORDER ASSIGNING CASE TO DIVISION ONE—June 6, 1955

Now at this day, it is ordered by the court that the above entitled cause be, and the same is hereby assigned to Division One.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ARGUMENT AND SUBMISSION OF CASE—September 16, 1955

Come now the parties, by their respective attorneys, and after arguments submit the above entitled cause to the Court.

IN SUPREME COURT OF MISSOURI

JAMES C. ROGERS, Respondent,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation, Appellant

Appeal from the Circuit Court of the City of St. Louis.

JUDGMENT—November 14, 1955

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis

rendered, be reversed, annulled and for naught held and [fol. 438] esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment; and that the said appellant recover against the said respondent his costs and charges herein expended, and have execution therefor. (Opinion filed.)

[fol. 439]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE,  
SEPTEMBER SESSION 1955

No. 44,595

JAMES C. ROGERS, Plaintiff-Respondent,

v.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD  
COMPANY, a Corporation, Defendant-Appellant

Appeal from the Circuit Court of the City of St. Louis

Honorable F. E. Williams, Judge

OPINION—November 14, 1955

Plaintiff, James C. Rogers, instituted this action under the Federal Employers' Liability Act (45 U. S. C. A., § 51 et seq.) for personal injury alleged to have been sustained by him July 17, 1951, when, during the course of his employment, he was burning weeds on defendant's right of way near Garner, Arkansas, and fell at one of defendant's drainage culverts. Plaintiff had verdict and judgment for \$40,000 damages, and defendant has appealed.

Plaintiff alleged that he, as defendant's employee, was engaged in burning weeds by the use of a hand torch at a point a short distance north of Garner Crossing; that in so doing he was required to work at a place in close proximity to defendant's tracks whereon trains were passing; and that a train caused the fire from the burning weeds to come so dangerously close to him that he was obliged to retreat

and move quickly from the place where he was working and to use as a place of work a part of defendant's right of way that was covered with loose and sloping gravel which [fol. 440] did not provide adequate and sufficient footing for plaintiff to thus move or work under the circumstances. Plaintiff further alleged "that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid."

Inasmuch as defendant-appellant's initial contention is that plaintiff failed to make out a case submissible to a jury and the trial court erred in overruling defendant's motion for a directed verdict, we will examine the evidence tending to support plaintiff's claim.

Plaintiff, twenty-four years old when injured, fell and was injured at a culvert approximately two hundred fifty yards north of Garner Crossing, a public crossing over defendant's line. At this point defendant's double-track line lies in a north-south direction. The tracks, consisting of rails and ties resting on gravel or crushed rock ballast, are supported by an earthen "dump."

Plaintiff had become the employee of defendant as a section laborer May 21, 1951; and in the morning of July 17, 1951, he with others of the section crew in charge of one Howdershell as foreman had started working near McRae, a short distance south of Garner Crossing. The section men worked until ten-thirty between McRae and Garner Crossing, at which time the foreman directed others of the crew to do some work three or four hundred yards north of the crossing. However, plaintiff was given the task of burning weeds and other vegetation on the shoulder, and on an area two and a half or three feet wide down over the crest of the incline of the dump. Plaintiff was told to begin just north of the crossing and burn the vegetation up to a point several hundred yards north of the crossing. The vegetation was dry. It had been withered and killed by chemicals.

Plaintiff was given a torch consisting of a quart container [fol. 441] with a spout on one side and a three-foot handle on the other. The spout was stuffed with waste for a wick, and the container was filled with kerosene and "white gasoline mix." Plaintiff had not theretofore seen anyone attempt to fire vegetation with that sort of device. He said that normally it is done with a flame thrower wherein the operators sit fifteen or twenty yards ahead of the flame. Flame throwers burn the whole right of way. Plaintiff had seen a flame thrower used. This was long before he was employed by defendant. Plaintiff does not know what the section crew's duty was when the flame thrower was used. (Defendant's foreman testified a machine had been used as a flame thrower in burning weeds from 1928 or 1929 to early 1950. The machine caused too much fire. It burned hay, pasture and woodland on properties adjoining the right of way. The section men had to follow along and fight fire. The machine was later converted into a sprayer to kill weeds and after they are killed, the section men burn them. They use a torch or "something that is handy." They now have less fire and fire fighting.)

Pursuant to instructions, plaintiff had fired the weeds, "just spots," along the west shoulder and west side of the incline up to a point thirty or thirty-five yards south of the drainage culvert when a train came from the south on the east (northbound) track.

In firing the weeds, plaintiff had been walking two and a half or three feet from the west ends of the ties supporting the rails of the west (southbound) track. There is a flat place, "a path," along there—a shoulder three to three and a half feet wide—between the edge of the sloping ballast and the crest of the dump.

Having heard the train whistle for the crossing and having seen that the train was on the east track, plaintiff quit firing the weeds, set the torch on a tie west of the west rail of the west track and ran northwardly to a point "right next" to the culvert. He knew the culvert was there. He had noticed it when he "was running north." But he paid no attention to it. He had forgotten it at the time. And, ignoring the fire, plaintiff directed his attention to the [fol. 442] passing train. Plaintiff knew there would be a



"wind come along behind" a passing train; but, there being a track between the fire and the train, he "didn't think the wind would affect it too much." Plaintiff explained how he was injured as follows, "At the time I thought I was far enough away, that I was plenty far enough to clear myself of the fire or any danger of the fire and it was time to start to watch these journals. So I set my torch down on the end of the tie, and was standing out on the flat surface, watching the train go by. After the train had gotten approximately half or two-thirds of the way back, I felt this heat on my face, on the side of my face. I turned to see what had happened, and it was fire right up in my face. I threw my left arm over my face and started turning to the west, to the north, backing away rapidly from the fire, and that is when I walked in on this culvert and slipped and fell."

Plaintiff further testified his foreman had instructed that when trains approached the section men were to "get clear of what we were doing and stand and watch the trains go by for hot boxes. \* \* \* He (the foreman) said at all times he wanted some of (the) men on one side of the track and some on the other." The foreman had also said, "'Don't stand even on the end of the ties or close to the other rail while there is a train on the opposite rail, because the interference, the sound of one train would deaden the sound of another one that possibly would come from the other way.'" The foreman had said to "'always stand on the shoulder'." Plaintiff testified there was no flat surface or walkway over the top of the culvert where he was injured. A flat pathway on the shoulder including the ends of culverts was "supposed to be" kept free of ballast, so "the men would have a safe place to walk." He said that "normally" there is a flat place two or two and one-half feet on which to walk across a culvert; on this one there was nothing but crushed rock—no flat surface. "It (the ballast) rolled out from under me." Vibrations of trains had shaken crushed rock down onto the culvert so as to make a sloping incline.

Plaintiff, on cross-examination, testified that, when the [fol. 443] foreman told him and others of the section crew to suspend their labors when a train approached and watch

for hot journal boxes, he did not understand that he, plaintiff, when burning weeds, was to completely ignore the fire. Plaintiff "never thought he (the foreman) meant anything like that." Plaintiff said he knew it was his primary duty to watch the fire.

Plaintiff, on cross-examination, further testified as follows, "Q. When you slipped, you say the gravel slipped out from underneath you? A. Yes. Q. This is that portion of the gravel that is right up next to the ties, isn't it? A. Yes, sir. Q. There is gravel right up next to those ties everywhere along the railroad, isn't there? A. Yes, sir. Q. That is the proper way, I believe, that a railroad is built so far as you know, isn't it? A. Yes. \* \* \* Q. You say the section gang keeps a path there for themselves to walk on? A. It is there, yes, sir. Q. On both sides of the right-of-way? A. Yes, that's right. Q. Every place on the railroad you have been? A. No, sir, not every place. Q. Well, all along the right-of-way on that section you worked on? A. Yes; there is a flat surface of dirt other than where the culverts are. Q. Other than where the culverts are? A. Yes. Q. So anytime you come to a culvert there isn't any. Is that right? A. There is not a dirt, flat surface. Q. At any culvert? A. To a certain extent; I mean not like a shoulder is."

Defendant's foreman testified that, "generally speaking," there is a shoulder eighteen inches to three or four feet wide along the outer edge of the ballast. There is no ballast on the shoulder unless "there would be loose rock kicked out. \* \* \* We clean it up if we have a slide." The section men keep the ballast "lined up (approximately) straight."

As stated, defendant-appellant contends the trial court erred in overruling defendant's motion for a directed verdict. It is said there was no proof that an accident and injury could have been reasonably foreseen from the manner in which the drainage culvert was constructed and maintained; and there was no evidence that plaintiff's alleged injury was proximately caused by the method [fol. 444] adopted by the defendant in burning the weeds or that such an injury or other danger could have been reasonably foreseen in the method used by defendant.

As to the issue of negligence—the facts in the instant case

are not like those in *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062, cited by plaintiff-respondent, wherein the employee was ordered to work at a particular place where there was a narrow footing and no guardrail on a bridge eighteen feet above the ground, and the wrench he was required to use, unless disengaged when the doors of a hopper car were opening, was likely to spin with the shaft of the hopper and throw the employee off balance. Defendant was not absolved from its continuing duty to provide the employee with a reasonably safe place to work by the fact that the work there required was fleeting or infrequent. The nature of the task which the employee undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guardrail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether the employer, in furnishing the employee with that particular place in which to perform the task was negligent. Nor are the facts of the instant case like those in *Kelso v. W. A. Ross Const. Co.*, 337 Mo. 202, 85 S. W. 2d 527, wherein the employee was required to work alternately between the top of a rock pile where he was safe, and on the ground by the rock pile in the performance of duties which distracted his attention from the danger of trucks passing or backing through or into his place of work, and no warning was given or other precaution taken to protect him from the danger. In *Tatum v. Gulf M. & O. R. Co.*, 359 Mo. 709, 223 S. W. 2d 418, cited by plaintiff-respondent, there was no catwalk, platform or guardrail on a trestle so as to guard trainmen against the danger of falling to a creek thirty-four feet below. In *Luthy v. Terminal R. Ass'n of St. Louis, Mo. Sup.*, 243 S. W. 2d 332, there was no light at plaintiff's place of work, and plaintiff working in the dark fell over a black switch [fol. 445] mechanism when attempting to board a car.

As to the issue of causal connection—the mere fact that injury follows negligence does not necessarily create liability—causal connection between negligence and injury is necessary. The test of whether there is causal connection is that, absent the negligent act the injury would not have

occurred. Moreover, in order that negligence be actionable, there must not only be causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury. Foreseeability of injury is sometimes employed as a test of proximate cause; but if it reasonably could have been foreseen or anticipated, that an act of commission or omission was likely to injure someone, then it makes no difference that the manner in which the act did injure someone might not have been foreseen or anticipated and the actor may be held liable for any injury which, after the occurrence, appears to have been a natural and probable consequence of his act. *Kimberling v. Wabash R. Co.*, 337 Mo. 702 85 S. W. 2d 736; *Annin v. Jackson*, 340 Mo. 331, 100 S.W. 2d 872; *Pedigo v. Roseberry*, 340 Mo. 724, 102 S.W. 2d 600; *Mrazek v. Terminal R. Ass'n of St. Louis*, 341 Mo. 1054, 111 S.W. 2d 26; *Gray v. Kurn*, 345 Mo. 1027, 137 S.W. 2d 558; *Rose v. Thompson*, 346 Mo. 395, 141 S.W. 2d 824; *Fassi v. Schuler*, 349 Mo. 160, 159 S.W. 2d 774; *Springer v. Security Nat. Bank Savings & Trust Co.*, Mo. Sup. 175 S.W. 2d 797; *Branstetter v. Gerdeman*, Mo. Sup., 274 S.W. 2d 240.

The principle of the essentiality of proximate causation has been recognized by the Supreme Court of the United States in Federal Employers' Liability Act cases. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444; *Brady v. Southern R. Co.*, 320 U.S. 476, 64 S. Ct. 232; *Reynolds v. Atlantic Coast Line R. Co.*, 336 U.S. 207, 69 S. Ct. 507. As pointed out in *Luthy v. Terminal R. Ass'n of St. Louis*, supra, Mo. Sup., 243 S.W. 2d 332, the *Brady* case (a five to four holding) involved facts arising prior to the 1939 amendment to the Federal Employers' Liability Act. However, the 1939 amendment did not affect the rule that liability must be based on negligence—a proximate cause of the injury. In *Tiller v. Atlantic Coast Line R. Co.*, [fol. 446] supra, the court held that the Act and its amendment of 1939 abolished the post-*Priestly v. Fowler* defenses (the fellow servant-assumption of risk rule) and authorized comparison of negligence instead of barring the employee from all recovery because of contributory negligence. But the Act and the amendment "leave for practi-



cal purposes only the question whether the carrier was negligent *and whether that negligence was the proximate cause of the injury.*" (Our italics.)

In the Brady case, plaintiff's decedent, assisting in a switching movement, was thrown from the step of a gondola car to instant death when the trucks of the car hit "the wrong end" of a closed derailer on the east rail of the switch track. The opposite (west) rail of the switch track was defective. The west rail was so worn on the top and sides that experts were of the opinion it permitted the thrust of the east wheels of the trucks, as they rose over "the wrong end" of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, "nine times out of ten, if the best type" rail was in use. The misuse of the derailer was an act of negligence, but it was mere speculation as to whether that negligence was chargeable to decedent or another. Plaintiff, therefore, could not recover on the theory that defendant was negligent in setting the derailer without warning decedent. As to negligence in using a defective rail—the rail was sufficient for ordinary use, and defendant was not obliged to foresee or guard against misuse of the derailer; although a witness with years of experience as a brakeman recalled instances when trains were improperly backed over a closed derailer. The Supreme Court of the United States was of the opinion that the misuse of the derailer was entirely disconnected from the earlier act of defendant in placing the weak rail in the track. The unsound rail was not a proximate cause of the accident. The mere fact that with a sound rail the accident would not have happened was not enough.

In our case, plaintiff's testimony leaves much unsaid as to the actual condition at the west end of defendant's drain-[fol. 447] age culvert, and as to the place where defendant was stepping when he fell. Plaintiff's testimony at best tends to show the fact that generally there was a level shoulder between the edge of the ballast and the crest of the dump supporting defendant's tracks. This level shoulder was supposed to be kept there so that section men might have a safe place to walk when working. There were flat surfaces across the ends of culverts, but not "like" the shoulders were. Considered from a standpoint most favorable to



plaintiff, it reasonably could be said the flat surface across the west end of the culvert in question was narrower than elsewhere along the shoulder, and the vibration of trains had loosened and shaken down some gravel or crushed rock so as to make an inclined surface down to or near the end of the culvert. Plaintiff's testimony, which we have quoted in question and answer form, *supra*, was support for a conclusion that plaintiff slipped on gravel "right up next to the ties"; however, at another time while testifying, plaintiff said, "I didn't back up east, next to the rails." Even so, the condition of the culvert was not shown to have been unsafe for workmen in the ordinary use of the area in maintaining the tracks, including the firing and attending the firing of "spots" of weeds along the shoulder and incline of the dump. Can it be correctly said that a reasonably careful and prudent person would assume that loose gravel or crushed rocks, shifted down on the shoulder at the culvert by the vibration of trains, would subject section men to an unreasonable hazard, accustomed as section men are to moving over tracks, ties and ballast in their multiple duties in the maintenance of the line? It is established that the standard of care must be commensurate to the dangers of the business. Less diligence is required where the danger is slight than where great. *Frizzell v. Wabash R. Co.*, 8 Cir., 199 F. 2d 153. It is true plaintiff was confronted by an emergency, in a sense; but, as we shall see, it was an emergency brought about by himself.

Nor was there evidence tending to show that the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burning weeds. See [fols. 448-475] and compare *Fore v. Southern Ry. Co.*, 4 Cir., 178 F. 2d 349. Of course, it could be asserted that fire itself is a hazard. But it is not contended that defendant was negligent in starting a fire. And the use of the hand torch in firing the weeds did not make the fire dangerous. Defendant did not start a fire on its right of way and abandon it to sweep at large in changing winds or in swirls of wind caused by passing trains. Defendant had detailed plaintiff to fire the weeds; and, according to his testimony, plaintiff knew it was his primary duty to watch the fire.

It seems to us that the fire—unattended and unwatched as it was—swept northwardly by the wind of the passing

train toward defendant's culvert so that plaintiff (who had left the fire unattended) was obliged to move blindly away and fall, was something extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert. And now, after the event, we are obliged to say we think plaintiff's injury was not the natural and probable consequence of any negligence of defendant. And if there was negligence in failing to maintain a sufficiently wide path across the culvert or in permitting that path to become covered with crushed rock or gravel, still plaintiff's evidence is completely lacking in probative facts supporting a conclusion that defendant's negligence, in whole or in part, contributed to plaintiff's injury. *Brady v. Southern R. Co.*, supra, 320 U.S. 476, 64 S. Ct. 232; *Atlantic Coast Line R. Co. v. Anderson*, 5 Cir., 221 F. 2d 548; *Chesapeake & O. Ry. Co. v. Burton*, 4 Cir. 217 F. 2d 471; *Gill v. Pennsylvania R. Co.*, 3 Cir., 201 F. 2d 718; *Fore v. Southern Ry. Co.*, supra, 178 F. 2d 349; *Wolfe v. Henwood*, 8 Cir., 162 F. 2d 998; *Seaboard Air Line R. Co. v. Gentry*, Fla., 46 So. 2d 485; *Restatement, Torts*, § 433.

The judgment should be reversed.

• It is so ordered.

Paul Van Osdol, Commissioner.

Coil, C., Concur.

Holman, C., Concur.

PER CURIAM: The foregoing opinion by Van Osdol, C. is adopted as the opinion of the court. All of the Judges concur.

[fol. 476] IN SUPREME COURT OF MISSOURI

ORDER OVERRULING MOTIONS FOR MODIFICATION OF OPINION,  
FOR A REHEARING, OR, IN THE ALTERNATIVE, TO TRANSFER  
TO COURT EN BANC—Dec. 12, 1955

Now at this day, the Court having seen and fully considered the motions of the respondent for modification of the opinion in the above entitled cause and for a rehearing herein or, in the alternative, to transfer said cause to the Court en Banc, doth order that said motions be, and the same are hereby overruled.

[fols. 477-478] **RESPONDENT'S MOTION TO STAY MANDATE.  
AND ORDER STAYING MANDATE** (omitted in printing)

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[fol. 479] **Clerk's Certificate to foregoing transcript**  
omitted in printing.

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[fol. 480] **SUPREME COURT OF THE UNITED STATES**

**[Title omitted]**

**ORDER ALLOWING CERTIORARI. Filed February 27, 1956.**

The petition herein for a writ of certiorari to the  
Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy  
of the transcript of the proceedings below which accom-  
panied the petition shall be treated as though filed in  
response to such writ.

(7983-0)

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JAN 11 1956

HAROLD B. WILLEY, Clerk

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955

No. ~~625~~ 78

JAMES C. ROGERS,  
Petitioner,

vs.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC  
RAILROAD COMPANY, a Corporation,  
Respondent.

**PETITION FOR WRIT OF CERTIORARI**  
To the Supreme Court of Missouri.

MARK D. EAGLETON,  
THOMAS F. EAGLETON,  
3746 Grandel Square,  
St. Louis 8, Missouri,  
Attorneys for Petitioner.

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## I.

- (1) The state court by its decision and judgment in this cause denied petitioner a right specially set up and claimed by him under the Federal Employers' Liability Act, namely, the right to have his case submitted to a jury on the theory that the petitioner, while admittedly employed by respondent in interstate commerce, was injured as a result of the negligence of the respondent in failing to use ordinary care to furnish the petitioner a reasonably safe place in which to work and a reasonably safe method with which to perform said work..... 11
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# **SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM; A. D. 1955.

No. ....

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**JAMES C. ROGERS,**  
Petitioner,

vs.

**GUY A. THOMPSON, Trustee, MISSOURI PACIFIC  
RAILROAD COMPANY, a Corporation,**  
Respondent.

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## **PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Missouri.**

To the Honorable The Supreme Court of the United States  
of America:

Petitioner respectfully petitions this Honorable Court  
to grant the Writ of Certiorari to the Supreme Court of  
Missouri in the above case. In this behalf, petitioner shows  
unto the Court:

### **OPINION OF THE COURT BELOW.**

James C. Rogers, Plaintiff (Respondent), v. Guy A.  
Thompson, Trustee, Missouri Pacific Railroad  
Co., a Corporation, Defendant (Appellant).

The opinion of the Supreme Court of Missouri is not  
yet reported but it appears at pages 439 to 449 of the Rec-  
ord and is set out verbatim in Appendix A.

## **STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.**

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. Code, Sec. 1257 (3) providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Judgment of the Supreme Court of Missouri, Division No. 1, sought to be reviewed, was entered on the 14th day of November, 1955 (R. 437-438) and is set out in Appendix B.

Thereafter on the 28th day of November, 1955, the petitioner filed a Motion for Modification of the Opinion of the Court, and for a Rehearing, or, in the Alternative, Transfer to the Court En Banc (R. 449) and these are completely set out as Appendices C and D.

Thereafter on the 12th day of December, 1955, the Supreme Court of Missouri overruled the motion to modify the opinion of the Court and overruled petitioner's motion for rehearing and overruled petitioner's motion to transfer to the court en banc; and said judgment became final (R. 476). The order overruling said motions is contained in Appendix E.

Division No. 1 of the Supreme Court of Missouri upon its refusal to transfer the cause to the court en banc was the highest court of the state in which a decision could be had in said cause; and in said cause the petitioner specially set up and claimed a right under a Statute of the United States, namely, the Federal Employers' Lia-

bility Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, Sections 51-60.

It is claimed that the decision of the state court under this federal statute "is not in accord with applicable decisions of this court."

### QUESTIONS PRESENTED.

It being admitted by the pleadings (R. 2, 5) that the petitioner's duties as an employee of the respondent were in furtherance of the interstate commerce transportation business of the respondent and that by reason thereof, the petitioner and the respondent were at all times engaged in interstate commerce and were subject to the Federal Employers' Liability Act, 45 U. S. Code, secs. 51-60, the questions presented for review are:

(1) Whether, the petitioner who had no experience whatsoever in firing weeds along the respondent's right-of-way (R. 15) and who theretofore had never seen anyone attempting to do so (R. 15) was entitled to have the negligence of the respondent submitted to the jury where the uncontradicted evidence showed that the respondent required the petitioner (R. 20, 21, 88, 89, 90) to be upon said right-of-way in close and dangerous proximity to a passing train of the respondent which caused the fire to blow toward the petitioner and thus to endanger his safety (R. 23).

(2) Whether, the petitioner was entitled to have the jury consider the respondent's negligence in creating the afore-said dangers, thereby causing the petitioner to retreat and move quickly from the place where he was standing while inspecting the passing train for "hot boxes" and thus to use as a place of work a part of the respondent's right-of-way covered with loose and sloping gravel which did not provide adequate and sufficient footing for the petitioner to move in a reasonably safe manner.

(3) Whether, the petitioner, under the circumstances aforesaid, was entitled to have his case submitted to a jury under evidence showing that the respondent's method of work was unsafe and dangerous in that (a) the petitioner was required to burn weeds which had previously been chemically prepared so that they would ignite rapidly; (b) the petitioner was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required the petitioner to be in close proximity (within six feet) of the flame; (c) the petitioner was required to burn the weeds in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner; (d) the respondent did in fact operate its train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward the petitioner; (e) the respondent did not provide the petitioner with a path or other means adequate for escape from the fire; (f) the respondent continued to impose the duty upon the petitioner to stand on the west shoulder and to inspect and watch the passing train for "hot boxes."

(4) Whether, the petitioner was entitled to have submitted to the jury the nature of the task which the petitioner was performing, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, walk or run in order to escape the perils of the fire set upon him by the movement of the respondent's train so that the jury could consider all these facts and circumstances in determining whether the respondent was negligent.

(5) Whether, the state court has narrowed the concept of "proximate cause" under the Federal Employers' Liability Act and has usurped the function of the jury in holding as a matter of law that the petitioner's injury was not proximately caused by negligence of the respondent.



### **STATUTES INVOLVED.**

The statutes involved are:

28 U. S. Code, Sec. 1257 (Appendix F).

45 U. S. Code, Sec. 51 (Appendix G).

45 U. S. Code, Sec. 53 (Appendix H).

45 U. S. Code, Sec. 54 (Appendix I).

45 U. S. Code, Sec. 56 (Appendix J).

### **STATEMENT OF MATERIAL FACTS.**

Under the pleadings (R. 2, 5) it was admitted that the petitioner's duties as an employee of the respondent were in furtherance of the interstate commerce transportation business of the respondent and that by reason thereof the petitioner and the respondent were at all times herein mentioned engaged in interstate commerce and were subject to the Federal Employers' Liability Act, 45 U. S. Code, secs. 51-60.

The petitioner, 27 years old at the time of trial, married, father of one child (R. 8, 9), brought this suit against Guy A. Thompson, who was operating as trustee, the Missouri Pacific Railroad Company, to recover damages for injuries sustained at Garner, Arkansas, through the negligence of the railroad, in failing to use ordinary care to furnish the petitioner a reasonably safe place in which to work or a reasonably safe method of doing said work. The petitioner at the time of injury was assigned to the task of burning weeds by the use of a hand torch. He had no warning or preparation as to how to safeguard himself from the perils of fire fanned up by a passing train operated by the respondent. The injury occurred on July 27, 1951, about 10:30 A. M. (R. 12).

The petitioner had two duties to perform at one and the same time: (1) to inspect passing trains for "hot boxes" and (2) to attend the fire then set on the shoulder. The performance of both of these duties required petitioner to be upon the west shoulder of the respondent's right-of-way (R. 20-21).

To the south, west and north of the petitioner were weeds (R. 28) prepared for rapid ignition by chemical spray previously applied by the respondent (R. 58, 60, 86, 194). These dead weeds were thicker and taller toward the north, the direction toward which he was working (R. 194), and the culvert was located only 30 or 35 yards north of the petitioner (R. 18). The west shoulder, on which petitioner performed his duties, was flat and three or four feet wide (R. 13), offering exit from the flames only as far north as the culvert from which he fell (R. 24, 25, 185, 186). At the culvert, such exit ended, and there was no flat surface or walkway on the culvert (R. 24, 25, 185, 186).

This was the first time the petitioner had ever attempted to do said work and he had never watched anyone attempt to do it theretofore (R. 15). He had been given this hand torch only 30 to 45 minutes before the injury occurred (R. 16).

On this occasion the petitioner "was not notified by anyone" of the approach of the northbound train involved herein (R. 26, 62). Ordinarily, the section foreman would notify his crew to clear the tracks prior to the approach of a train (R. 26). That was the foreman's job and the section crew would continue working until he called "train" (R. 26, 62).

He was told by the foreman not to cross to the east because "the sound of one train would deaden the sound of another one that possibly would come from the other way" (R. 21). He was further told to "always stand on the

shoulder" (R. 21). The only other instructions given to petitioner were to the effect that whenever a train was passing "to drop everything" he was doing and watch for "hot boxes" (R. 20, 88, 89, 90). Standing on the west shoulder, as above directed, would place the petitioner in close proximity to the tracks whereon respondent's train was moving (R. 19).

When petitioner heard the whistle of the northbound train (the only notice he had) he immediately ran a distance of 30 to 35 yards to the north before he set down his torch; this was the amount of space intervening between him and the culvert that was north of him (R. 18, 22). While running to the north, the petitioner necessarily had his back to the fire which was south of him. He ran this distance in order to get far enough away from the fire to clear himself (R. 23) and when he reached this point he thought he was "plenty far enough" to clear himself of the fire "or any danger of the fire and it was time to start to watch these journals" (R. 23). He took his position on the west shoulder where he was told to stand (R. 21).

At this instant, the northbound engine had already passed him (R. 22, 23). He began watching the passing train for "hot boxes" under instructions theretofore given to him by his foreman. While thus watching said "hot boxes" (a period of 2 or 3 seconds) approximately three or four cars went by at a rate of 35 to 40 miles per hour (R. 180-181). He was then overtaken by "fire right up in" his face (R. 23). This caused him to retreat quickly (R. 23, 28, 63). He threw his left arm over his face, backing away rapidly, six or eight feet onto the culvert immediately north of him, at which time he fell because of the inadequacy of the footing there provided to him (R. 23, 24, 28, 67, 98, 114, 193).

When he stepped upon the crushed rock along the western part of the culvert, the crushed rock rolled out from

his feet, causing him to fall and to be injured (R. 25, 68, 69, 90, 91). He did not and could not look to see where he was going (R. 23, 68). At this point he had fire and smoke in his eyes and could not see (R. 23, 68).

In thus moving to the north, he moved to the only direction that was open to him. He could not move to the south, because that direction was blocked by the fire (R. 86). He could not move to the west because doing such would have placed him in weeds which were chemically prepared for burning and they were immediately adjacent to the fire (R. 58, 60, 86, 194). He could not move to the east, because he had been specifically instructed by the foreman not to stand on, or close to the adjacent track if a moving train was on the other track (R. 21). He was told to "always stand on the shoulder" (R. 21).

The petitioner, who had no previous experience, did not know that the passing train would cause sufficient wind to fan or blow the fire (R. 23, 87). He knew the train would cause wind (R. 87), but thought the wind would not affect the fire too much because there was another track (the southbound track) between the train and the petitioner (R. 87, 19).

The foreman was aware that the weeds which he ordered the petitioner to burn were dead, having been killed by a prior chemical spray (R. 287). The foreman had a great deal of experience in doing this kind of work and had for over twenty years used a flame-thrower machine to fire the shoulders (R. 15, 84, 85, 304). This machine permits the employees to remain in a place of safety as they are stationed on a part of the machine approximately 15 or 20 yards away from the fire (R. 16). The petitioner testified that was the normal method of doing said work (R. 16). The foreman, however, testified that the flame-thrower had been discarded some years before the date of accident be-



cause it caused too much damage along the right-of-way (R. 209, 300).

The petitioner testified he knew it was his primary duty to watch the fire (R. 90), and that he was never told "to completely ignore a fire you set" (R. 89); but the positive order to watch for "hot boxes" remained in effect and he was given no warning or instructions as to the manner of performing those two tasks simultaneously. Neither the foreman nor any other witness testified or even intimated that the petitioner's attempt to perform these two tasks was improper or different from what was expected of him.

The petitioner alleged (R. 3) "that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid."

The respondent in his Answer (R. 5, 6, 7) denied his own negligence and alleged that the petitioner's injuries were directly caused by the petitioner's own negligence and carelessness in four respects: (a) in failing to keep a lookout ahead and laterally in the direction in which he was walking (R. 6); (b) in failing to maintain secure footing in the circumstances under which he was working and performing his duties (R. 6); (c) in walking backwards or sideways without looking in the direction in which he was walking and without ascertaining for himself the security of his own footing (R. 6); (d) in making a mis-step at a time when the petitioner was familiar with the conditions under which he was required to work and the structure of the ground upon which he was working and in thus failing to protect himself from slipping and falling (R. 6, 7).



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The respondent did not allege or claim in his Answer that the petitioner was negligent in failing to "attend or watch" the fire.

The trial court submitted the case to the jury under written instructions and the jury returned a unanimous verdict in favor of the petitioner and assessed his damages in the sum of Forty Thousand Dollars (\$40,000.00) (R. 426). Before it could return a verdict, the jury was required to find that the respondent was negligent in failing to use ordinary care to provide the petitioner with a reasonably safe place in which to work and a reasonably safe method of doing said work under the circumstances aforesaid (R. 419, 420, 421).

At the request of the respondent, the issue of the petitioner's alleged negligence in failing to guard properly his footsteps was submitted to the jury (R. 421-422). The respondent did not request the trial court to give any instructions authorizing the jury to find that the petitioner was guilty of negligence in leaving the fire "unattended and unwatched" or in creating any emergency, and no such instruction was given by the trial court of its own motion (R. 419 through 426).

The trial court accepted the verdict of the jury and entered judgment thereon. Thereafter, the respondent's motion for a new trial was overruled (R. 431). The respondent appealed to the Supreme Court of Missouri, which court reversed the judgment (R. 437-438) holding that the petitioner had failed to make a submissible case.

## **REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

### **I.**

- (1) The State Court by Its Decision and Judgment in This Cause, Denied Petitioner a Right Specially Set Up and Claimed by Him Under the Federal Employers' Liability Act, Namely, the Right to Have His Case Submitted to a Jury on the Theory That the Petitioner, While Admittedly Employed by Respondent in Interstate Commerce, Was Injured as a Result of the Negligence of the Respondent in Failing to Use Ordinary Care to Furnish the Petitioner a Reasonably Safe Place in Which to Work and a Reasonably Safe Method With Which to Perform Said Work.**

The judgment of the state court, if permitted to stand, will deprive this petitioner of the right of a trial by jury, a basic feature of our system of federal jurisprudence. State courts generally will be encouraged to disregard the clear and repeated pronouncements of this Court to the effect that the trial court must submit the issues of negligence to a jury whenever the facts establishing negligence are in dispute or the evidence is such that fair-minded men may draw different inferences therefrom. Under such circumstances the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. This court granted certiorari to the Supreme Court of Missouri in the Lavender case cited below wherein the rules announced above were authoritatively stated by Mr. Justice Murphy speaking in behalf of this court.

Bailey v. Central Vermont R. Co. (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Tennant v. Peoria & Pekin Union R. Co. (1944), 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520;

Lavender v. Kurn (1946), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;

Wilkerson v. McCarthy et al. (1949), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

**A. The state court usurped the function of the jury.**

It was the function of the jury to determine whether or not the respondent was negligent in requiring this inexperienced employee to perform conflicting duties at one and the same time, in adopting an unsafe method to do the particular work, in furnishing inadequate footing in which to perform this task. It was the province of the jury to weigh the hazards and effort which the work entailed, and to appraise the kind of footing and the space provided by respondent in which the petitioner could stand or move in order to escape the perils of the smoke and flames blown toward him by respondent's train.

**II.**

**The State Court Based Its Opinion Upon a Theory Not Presented by the Respondent in Its Answer (R. 6, 7) and Upon a Theory That Was Not Submitted to the Jury (R. 419 to 427).**

The state court pivoted its opinion upon the assertion that petitioner was injured through an emergency brought about by himself in leaving the fire "unattended and unwatched" (R. 448) (Appendix A, page 35). This conclusion was not warranted by the evidence and the state court refused to modify its opinion (R. 450 to 453) (Appendix C) to show the record facts (R. 180-181) to the effect that the petitioner necessarily while running north 30 to 35 yards in an effort to get far enough away to clear himself of the

fire. (R. 23) had to have and did have his back to the fire; that he then stood on the west shoulder where he was told to stand (R. 21) for only 2 or 3 seconds before he was overtaken by the flames; that during this few seconds' interval he was following the instructions of the respondent theretofore given him "to drop everything" and watch for "hot boxes" on the passing trains (R. 20, 88, 89, 90).

### III.

**The State Court Usurped the Function of the Jury in Deciding as a Matter of Law That Petitioner's Injuries Were Not Related to the Negligence of the Respondent and It Narrowed the Concept of "Proximate Cause" Under the Federal Employers' Liability Act.**

Under the Federal Employers' Liability Act the concept of proximate cause is enlarged by the wording of the statute and makes the employer liable for his negligence even though some other factor may logically be said to be more influential in producing the injury. See *Eglsaer v. Scandrett et al.*, 151 E. 2d 562, l. c. 565, wherein this thought is epitomized in a quotation from Mr. Justice Holmes: "We must look at the situation as a practical unit, rather than inquire into a purely logical priority."

### **ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

#### I.

It is elemental that the respondent owed the petitioner the duty to use ordinary care to furnish the petitioner (1) a reasonably safe place to work and (2) a reasonably safe method of work. This duty was a continuing duty and the respondent was not relieved of its obligations because

the petitioner's work at the place and by the method in question was fleeting or infrequent. *Bailey v. Central Vermont R. Co.* (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The mere fact that the petitioner was performing a task which was not of daily routine did not lessen the dangers attached thereto nor change the above standards of law. The continuing duty of the respondent followed the petitioner wherever he might go in the course of performing the work assigned to him by the respondent.

The state court in its opinion (R. 443), Appendix A, page 30, states the contentions of respondent as follows:

"As stated, defendant-appellant contends the trial court erred in overruling defendant's motion for a directed verdict. It is said there was no proof that an accident and injury could have been reasonably foreseen from the manner in which the drainage culvert was constructed and maintained; and there was no evidence that plaintiff's alleged injury was proximately caused by the method adopted by defendant in burning the weeds or that such an injury or danger could have been reasonably foreseen in the method used by defendant."

In the light of the record facts these contentions are untenable. The record is clear that the respondent prior to the petitioner's injury did nothing to foresee or anticipate the likelihood of petitioner's injury, although the respondent was under a duty to do so. Had the respondent given any thought to the matter

1) He would not have ordered the inexperienced petitioner to stand and work upon the west shoulder in close proximity to the tracks upon which a train was then and there being operated while the weeds were burning nearby.



2) He would not have sent a train at such speed that it would cause the fire to fan and spread rapidly.

The combination of the above two conditions cannot be reconciled with care.

3) If, however, he negligently insisted upon the above conditions, then he should have warned the petitioner of the dangers involved and he should have provided adequate means of escape therefrom.

No crystal ball was needed. Given the facts in this record, an injury was almost inevitable.

Paraphrasing the words of Mr. Justice Douglas in the Bailey case, supra,

"these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing *the petitioner* with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury." (Words in italics paraphrased.)

A) The state court usurped the function of the jury when it decided as a matter of law that the "evidence is completely lacking in probative facts supporting a conclusion that defendant's negligence, in whole or in part, contributed to plaintiff's injury" (R. 448). Appendix A, page 35.

The applicable rule of law is authoritatively stated by Mr. Justice Murphy in *Lavender v. Kurn* (1946), 327 U. S. 645, 1. c. 653, 66 S. Ct. 740, 90 L. Ed. 916, 1. c. 923:

"Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is re-

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quired on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

This Court expounded the same principles in *Wilkerson v. McCarthy et al.* (1949), 336 U. S. 53, l. c. 55 and 57; 69 S. Ct. 413, 93 L. Ed. 497, l. c. 501, wherein Mr. Justice Black said:

"This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. . . . It was because of the importance of preserving for litigants in FEIA cases their right to a jury trial that we granted certiorari in this case."

The opinion continued (l. c. 502):

"It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

## II.

The errors into which the state court fell are manifest.

A) After searching the record, it brought forth a theory of its own which was not presented by the respondent in the pleadings nor was it submitted by the respondent to the jury at the time of trial. Nowhere in the respondent's Answer (R. 6, 7) did the respondent allege that the petitioner was guilty of negligence in ignoring the fire or leaving it "unattended or unwatched" and the respondent did not request the trial court to give an instruction submitting any such issue (R. 419-427). The state court, however, in its opinion, stated: "It is true plaintiff was confronted by an emergency, in a sense; but as we shall see, it was an emergency brought about by himself" (R. 447). Appendix A, pages 34-35. This conclusion is not warranted by the evidence and it is certainly not in accordance with the statement of Mr. Justice Black in the Wilkerson case, supra, to the effect that "We need look only to the evidence and reasonable inferences which tend to support the case of a litigant."

In the first place, the petitioner did not create the emergency. It was definitely created by the respondent who required the petitioner to be upon the west shoulder of its right-of-way (R. 21) watching trains for "hot boxes" which duty the petitioner was not free to ignore since it was imposed upon him by the respondent. He could not move to the south and into the fire, nor to the west, which the fire would embrace (R. 58, 60). He was prohibited by positive instructions from crossing over the tracks to the east because of the dangers incident to such crossing (R. 21). This was the first time the petitioner had ever attempted to perform this duty (R. 15) and he had never seen anyone else attempt to perform it (R. 15). He did not know that the passing train would cause sufficient wind to fan or blow the fire (R. 86, 87). He thought he was

a safe distance away from the fire when he was overtaken by it while watching for "hot boxes" on the passing train (R. 20, 88, 89, 90).

The interval, used by the petitioner, covered only a matter of two or three seconds, as the uncontradicted evidence showed that only three or four cars of the train (R. 180-181) passed during the short period while the petitioner, pursuant to positive orders, was watching for "hot boxes." Since the train was moving at the rate of 35 to 40 miles per hour (R. 180-181) it was traveling at the rate of 49 to 56 feet per second. Therefore, it would travel three or four car lengths (120-160 feet) in two or three seconds. All the evidence showed that only three of four cars passed him (R. 180-181) while he was directing his attention to the "hot boxes." It was only during that short interval of two or three seconds that the petitioner left the fire "unattended and unwatched."

These are the undisputed facts which are determinative of whether or not the petitioner created the emergency in leaving the fire "unattended and unwatched." These same facts, ignored by the state court in its opinion, are decisive of the issue that it was the respondent who actually created the emergency by compelling the petitioner to watch the "hot boxes" at a time when it was highly dangerous for him to do so. It was the imposition of these concurrent and conflicting duties that helped to make the respondent's method of doing the work an unsafe and dangerous one. These conflicting duties were imposed upon the petitioner by the respondent at the very time when the respondent caused its train to move at such rate of speed that it did fan the fire toward the petitioner, whose place of work on the west shoulder was selected by the respondent (R. 21).

Conceding that the petitioner understood that his "primary" duty was to attend the fire and that he was not



told to ignore the fire completely" (R. 88), it does not follow that said duty was exclusive nor that he could ignore his concurrent duty, that of watching for "hot boxes."

The various labels on duties, whether they be called "first," "primary," "positive" or anything else, must be considered and evaluated in the light of all of the circumstances present. Of necessity, for a two or three second interval, the petitioner was required to give attention to one duty rather than to the other. To illustrate: A locomotive fireman is under the duty to watch his boiler and the amount of steam that is coming up and at the same time is under the duty to keep a lookout while approaching public crossings. It could well be said that the duty of watching the boiler and the steam is his "primary" or "first" duty. On the other hand, we know that the safety of the train and its passengers, as well as the safety of the public depends upon the performance of his "positive" duty to keep a vigilant watch while approaching public crossings. Can it be said that while the fireman is looking out of the window for two or three seconds in the performance of his "positive" duty, he is guilty of negligence in not performing the "primary" duty of watching the steam during that very same interval of time? The answer is "No," because of the very nature of the duties. A jury must appraise an employee's conduct in the light of all the circumstances in evidence. It must be remembered, too, that the petitioner who was not even charged with negligence in leaving the fire "unattended and unwatched" cannot have his recovery defeated by contributory negligence.

B) It will be further noted that the state court disposed of vital issues, to-wit: Whether the respondent exercised ordinary care to furnish the petitioner a reasonably safe place in which to work and a reasonably safe method of work simply by holding that the hand torch (in itself)



was safe and did not make the fire dangerous. The language employed by the state court is as follows: "Nor was there evidence tending to show that the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burning weeds. \* \* \* And the use of the hand torch in firing the weeds did not make the fire dangerous" (R. 447-448), Appendix A, page 35.

Such a simplification of the issues was unjustified. The petitioner does not contend that the hand torch alone endangered his safety. The state court ignores all of the other facts and circumstances in evidence. The petitioner, an inexperienced employee, was told to stand on the west shoulder (R. 21). He was instructed to watch the passing train for "hot boxes." This necessarily brought him into close and dangerous proximity to the passing train. He did not know the dangers that attached to this work and had received no warnings or any other preparation for it. While thus following instructions, he was imperiled by the fire and flames which were blown toward him by the passing train controlled by the respondent. His peril was caused by three things: (1) respondent's demand that the inexperienced petitioner stand and work upon the west shoulder in close proximity to the tracks upon which a train was then and there being operated while the weeds were burning nearby; (2) respondent's sending a train, under the circumstances aforesaid, at such rate of speed that it did cause the fire to fan and spread rapidly; and (3) the failure of the respondent to provide any reasonably safe means of escape.

These are the record facts and it is no answer to respondent's negligence under the circumstances here shown to simply say that the hand torch (in itself) was not dangerous and we think it is illogical to contend that these hazards can be considered as isolated and detached elements. They were all related to each other and respondent cannot be absolved merely because said hand torch

(in itself) was not unsafe or because the path over the culvert might be reasonably safe for other section men, at other times, performing other duties.

### III.

A) The state court usurped the function of the jury in deciding as a matter of law that the petitioner's injuries were not related to negligence on the part of respondent. In the words of Mr. Justice Black, in the Wilkerson case, *supra*,

"its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony" (93 L. Ed. 501).

In light of the facts, hereinbefore presented, it is difficult to understand how the state court reached the conclusion that the petitioner's movements in escaping from the fire were "extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert" (R. 448, Appendix A, page 35). Just plain common sense tells us that one who is exposed to the perils of fire in the performance of any duty should be provided with a reasonably safe avenue of escape. Certainly any prudent person would reasonably anticipate that when a train causes the fire to blow on an employee who is required to stand in close and dangerous proximity to said train that he might have to retreat quickly therefrom or else be consumed thereby. The shoulder and pathway were the same to the petitioner as the fire escape on a hotel building is to anyone lodged therein. It would be absurd to say that the hotel owner does not have to use ordinary care to maintain a fire escape in reasonably safe condition simply because said owner does not know when, where or how a fire will start.

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to

take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. \* \* \* It is the jury, not the court, which is the fact-finding body. \* \* \* The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. \* \* \* That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & Pekin Union R. Co.* (1944), 321 U. S. 29, l. c. 35, 64 S. Ct. 409, 88 L. Ed. 520, l. c. 525.

B) The state court narrowed the concept of "proximate cause" under the Federal Employers' Liability Act.

"The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus determined the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term is understood in the act, liability of the employer shall follow, irrespective of the other factors causally related in whole or in part from negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice

Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.' " The above quotation is from Roberts, "Federal Liabilities of Carriers", Sec. 869, as found in *Eglsaer v. Scandrett et al.*, 151 F. 2d 562, l. c. 565, 566, in which that court further states:

The statute "provides that if the railroad's negligence '*in part*' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relations'—if the injury or death resulted '*in part*' from defendant's negligence, there is liability."

"The words '*in part*' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident."

We believe that the state court's conclusion of law and fact that respondent's negligence was not the cause of the petitioner's injuries was invalid under the evidence and under any definition of "proximate cause." Certainly, a jury of fair-minded men should be permitted to find under the statute that respondent was negligent and that said negligence contributed "*in part*" to cause the petitioner's injuries.

**PRAYER.**

For the reasons herein given, petitioner prays for a Writ of Certiorari directed to the Supreme Court of Missouri to the end that the judgment of that court may be reviewed by this Court and reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

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## APPENDIX A.

Opinion of the Supreme Court of Missouri,  
November 14th, 1955.

(R. 439 to 449.)

In the  
Supreme Court of Missouri,  
Division Number One,  
September Session, 1955.

James C. Rogers,

Plaintiff-Respondent,

v.

Guy A. Thompson, Trustee, Missouri  
Pacific Railroad Company, a Cor-  
poration,

Defendant-Appellant.

No. 44,595.

Appeal From the Circuit Court of the City of St. Louis,  
Honorable F. E. Williams, Judge.

Plaintiff, James C. Rogers, instituted this action under the Federal Employers' Liability Act (45 U. S. C. A., § 51 et seq.) for personal injury alleged to have been sustained by him July 17, 1951, when, during the course of his employment, he was burning weeds on defendant's right of way near Garner, Arkansas, and fell at one of defendant's drainage culverts. Plaintiff had verdict and judgment for \$40,000 damages, and defendant has appealed.

Plaintiff alleged that he, as defendant's employee, was engaged in burning weeds by the use of a hand torch at a point a short distance north of Garner Crossing; that in so doing he was required to work at a place in close prox-

imity to defendant's tracks whereon trains were passing; and that a train caused the fire from the burning weeds to come so dangerously close to him that he was obliged to retreat and move quickly from the place where he was working and to use as a place of work a part of defendant's right of way that was covered with loose and sloping gravel which did not provide adequate and sufficient footing for plaintiff to thus move or work under the circumstances. Plaintiff further alleged "that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid."

Inasmuch as defendant-appellant's initial contention is that plaintiff failed to make out a case submissible to a jury and the trial court erred in overruling defendant's motion for a directed verdict, we will examine the evidence tending to support plaintiff's claim.

Plaintiff, twenty-four years old when injured, fell and was injured at a culvert approximately two hundred fifty yards north of Garner Crossing, a public crossing over defendant's line. At this point defendant's double-track line lies in a north-south direction. The tracks, consisting of rails and ties resting on gravel or crushed rock ballast, are supported by an earthen "dump."

Plaintiff had become the employee of defendant as a section laborer May 21, 1951; and in the morning of July 17, 1951, he with others of the section crew in charge of one Howdershell as foreman had started working near McRae, a short distance south of Garner Crossing. The section men worked until ten-thirty between McRae and Garner

Crossing, at which time the foreman directed others of the crew to do some work three or four hundred yards north of the crossing. However, plaintiff was given the task of burning weeds and other vegetation on the shoulder, and on an area two and a half or three feet wide down over the crest of the incline of the dump. Plaintiff was told to begin just north of the crossing and burn the vegetation up to a point several hundred yards north of the crossing. The vegetation was dry. It had been withered and killed by chemicals. Plaintiff was given a torch consisting of a quart container with a spout on one side and a three-foot handle on the other. The spout was stuffed with waste for a wick, and the container was filled with kerosene and "white gasoline mix." Plaintiff had not theretofore seen anyone attempt to fire vegetation with that sort of device. He said that normally it is done with a flame thrower wherein the operators sit fifteen or twenty yards ahead of the flame. Flame throwers burn the whole right of way. Plaintiff had seen a flame thrower used. This was long before he was employed by defendant. Plaintiff does not know what the section crew's duty was when the flame thrower was used. (Defendant's foreman testified a machine had been used as a flame thrower in burning weeds from 1928 or 1929 to early 1950. The machine caused too much fire. It burned hay, pasture and woodland on properties adjoining the right of way. The section men had to follow along and fight fire. The machine was later converted into a sprayer to kill weeds and after they are killed, the section men burn them. They use a torch or "something that is handy." They now have less fire and fire fighting.)

Pursuant to instructions, plaintiff had fired the weeds, "just spots," along the west shoulder and west side of the incline up to a point thirty or thirty-five yards south of the drainage culvert when a train came from the south on the east (northbound) track.



In firing the weeds, plaintiff had been walking two and a half or three feet from the west ends of the ties supporting the rails of the west (southbound) track. There is a flat place, "a path," along there—a shoulder three to three and a half feet wide—between the edge of the sloping ballast and the crest of the dump.

Having heard the train whistle for the crossing and having seen that the train was on the east track, plaintiff quit firing the weeds, set the torch on a tie west of the west rail of the west track and ran northwardly to a point "right next" to the culvert. He knew the culvert was there. He had noticed it when he "was running north." But he paid no attention to it. He had forgotten it at the time. And, ignoring the fire, plaintiff directed his attention to the passing train. Plaintiff knew there would be a "wind come along behind" a passing train; but, there being a track between the fire and the train, he "didn't think the wind would affect it too much." Plaintiff explained how he was injured as follows: "At the time I thought I was far enough away, that I was plenty far enough to clear myself of the fire or any danger of the fire and it was time to start to watch these journals. So, I set my torch down on the end of the tie, and was standing out on the flat surface, watching the train go by. After the train had gotten approximately half or two-thirds of the way back, I felt this heat on my face, on the side of my face. I turned to see what had happened, and it was fire right up in my face. I threw my left arm over my face and started turning to the west, to the north, backing away rapidly from the fire, and that is when I walked in on this culvert and slipped and fell."

Plaintiff further testified his foreman had instructed that when trains approached the sectionmen were to "get clear of what we were doing and stand and watch the trains go by for hot boxes. . . . He (the foreman) said



at all times he wanted some of (the) men on one side of the track and some on the other." The foreman had also said, "'Don't stand even on the end of the ties or close to the other rail while there is a train on the opposite rail, because the interference, the sound of one train would deaden the sound of another one that possibly would come from the other way.'" The foreman had said to "'always stand on the shoulder.'" Plaintiff testified there was no flat surface or walkway over the top of the culvert where he was injured. A flat pathway on the shoulder including the ends of culverts was "supposed to be" kept free of ballast, so "the men would have a safe place to walk." He said that "normally" there is a flat place two or two and one-half feet on which to walk across a culvert; on this one there was nothing but crushed rock—no flat surface. "It (the ballast) rolled out from under me." Vibration of trains had shaken crushed rock down onto the culvert so as to make a sloping incline.

Plaintiff, on cross-examination, testified that, when the foreman told him and others of the section crew to suspend their labors when a train approached and watch for hot journal boxes, he did not understand that he, plaintiff, when burning weeds, was to completely ignore the fire. Plaintiff "never thought he (the foreman) meant anything like that." Plaintiff said he knew it was his primary duty to watch the fire.

Plaintiff, on cross-examination, further testified as follows, "Q. When you slipped, you say the gravel slipped out from underneath you? A. Yes. Q. This is that portion of the gravel that is right up next to the ties, isn't it? A. Yes, sir. Q. There is gravel right up next to those ties everywhere along the railroad, isn't there? A. Yes, sir. Q. That is the proper way, I believe, that a railroad is built so far as you know, isn't it? A. Yes. . . . Q. You say the section gang keeps a path there for themselves to

walk on? A. It is there, yes, sir. Q. On both sides of the right-of-way? A. Yes, that's right. Q. Every place on the railroad you have been? A. No, sir, not every place. Q. Well, all along the right-of-way on that section you worked on? A. Yes, there is a flat surface of dirt other than where the culverts are. Q. Other than where the culverts are? A. Yes. Q. So anytime you come to a culvert there isn't any. Is that right? A. There is not a dirt, flat surface. Q. At any culvert? A. To a certain extent; I mean not like a shoulder is."

Defendant's foreman testified that, "generally speaking," there is a shoulder eighteen inches to three or four feet wide along the outer edge of the ballast. There is no ballast on the shoulder unless "there would be loose rock kicked out. . . . We clean it up if we have a slide." The section men keep the ballast "lined up (approximately) straight."

As stated, defendant-appellant contends the trial court erred in overruling defendant's motion for a directed verdict. It is said there was no proof that an accident and injury could have been reasonably foreseen from the manner in which the drainage culvert was constructed and maintained; and there was no evidence that plaintiff's alleged injury was proximately caused by the method adopted by the defendant in burning the weeds or that such an injury or other danger could have been reasonably foreseen in the method used by defendant.

As to the issue of negligence—the facts in the instant case are not like those in *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062, cited by plaintiff-respondent, wherein the employee was ordered to work at a particular place where there was a narrow footing and no guardrail on a bridge eighteen feet above the ground, and the wrench he was required to use, unless disengaged when the doors of a hopper car were opening, was likely to spin

with the shaft of the hopper and throw the employee off balance. Defendant was not absolved from its continuing duty to provide the employee with a reasonably safe place to work by the fact that the work there required was fleeting or infrequent. The nature of the task which the employee undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guardrail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether the employer, in furnishing the employee with that particular place in which to perform the task was negligent. Nor are the facts of the instant case like those in *Kelso v. W. A. Ross Const. Co.*, 337 Mo. 202, 85 S. W. 2d 527, wherein the employee was required to work alternately between the top of a rock pile where he was safe, and on the ground by the rock pile in the performance of duties which distracted his attention from the danger of trucks passing or backing through or into his place of work, and no warning was given or other precaution taken to protect him from the danger. In *Tatum v. Gulf, M. & O. R. Co.*, 359 Mo. 709, 223 S. W. 2d 418, cited by plaintiff-respondent, there was no catwalk, platform or guardrail on a trestle so as to guard trainmen against the danger of falling to a creek thirty-four feet below. In *Luthy v. Terminal R. Ass'n of St. Louis, Mo. Sup.*, 243 S. W. 2d 332, there was no light at plaintiff's place of work, and plaintiff working in the dark fell over a black switch mechanism when attempting to board a car.

As to the issue of causal connection—the mere fact that injury follows negligence does not necessarily create liability—causal connection between negligence and injury is necessary. The test of whether there is causal connection is that, absent the negligent act the injury would not

have occurred. Moreover, in order that negligence be actionable, there must not only be causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury. Foreseeability of injury is sometimes employed as a test of proximate cause; but if it reasonably could have been foreseen or anticipated that an act of commission or omission was likely to injure someone, then it makes no difference that the manner in which the act did injure someone might not have been foreseen or anticipated and the actor may be held liable for any injury which, after the occurrence, appears to have been a natural and probable consequence of his act. *Kimberling v. Wabash R. Co.*, 337 Mo. 702, 85 S. W. 2d 736; *Annin v. Jackson*, 340 Mo. 337, 100 S. W. 2d 872; *Pedigo v. Roseberry*, 340 Mo. 724, 100 S. W. 2d 600; *Mrazek v. Terminal R. Ass'n of St. Louis*, 341 Mo. 1054, 111 S. W. 2d 26; *Gray v. Kurn*, 345 Mo. 1027, 137 S. W. 2d 558; *Rose v. Thompson*, 346 Mo. 395, 141 S. W. 2d 824; *Fassi v. Schuler*, 349 Mo. 160, 159 S. W. 2d 774; *Springer v. Security Nat. Bank Savings & Trust Co.*, Mo. Sup., 175 S. W. 2d 797; *Branstetter v. Gerdeman*, Mo. Sup., 274 S. W. 2d 240.

The principle of the essentiality of proximate causation has been recognized by the Supreme Court of the United States in Federal Employers' Liability Act cases. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444; *Brady v. Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232; *Reynolds v. Atlantic Coast Line R. Co.*, 336 U. S. 207, 69 S. Ct. 507. As pointed out in *Luthy v. Terminal R. Ass'n of St. Louis*, supra, Mo. Sup., 243 S. W. 2d 332, the *Brady* case (a five to four holding) involved facts arising prior to the 1939 amendment to the Federal Employers' Liability Act. However, the 1939 amendment did not affect the rule that liability must be based on negligence—a proximate cause of the injury. In *Tiller v. Atlantic Coast Line R. Co.*, supra, the court held that the Act and its amendment



of 1939 abolished the post—**Priestly v. Fowler** defenses (the fellow servant—assumption of risk rule) and authorized comparison of negligence instead of barring the employee from all recovery because of contributory negligence. But the Act and the amendment “leave for practical purposes only the question whether the carrier was negligent and whether that negligence was the proximate cause of the injury.” (Our emphasis.)

In the *Brady* case, plaintiff's decedent, assisting in a switching movement, was thrown from the step of a gondola car to instant death when the trucks of the car hit “the wrong end” of a closed derailer on the east rail of the switch track. The opposite (west) rail of the switch track was defective. The west rail was so worn on the top and sides that experts were of the opinion it permitted the thrust of the east wheels of the trucks, as they rose over “the wrong end” of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, “nine times out of ten, if the best type” rail was in use. The misuse of the derailer was an act of negligence, but it was mere speculation as to whether that negligence was chargeable to decedent or another. Plaintiff, therefore, could not recover on the theory that defendant was negligent in setting the derailer without warning decedent. As to negligence in using a defective rail—the rail was sufficient for ordinary use, and defendant was not obliged to foresee or guard against misuse of the derailer, although a witness with years of experience as a brakeman recalled instances when trains were improperly backed over a closed derailer. The Supreme Court of the United States was of the opinion that the misuse of the derailer was entirely disconnected from the earlier act of defendant in placing the weak rail in the track. The unsound rail was not a proximate cause of the accident. The mere fact that with a sound rail the accident would not have happened was not enough.



In our case, plaintiff's testimony leaves much unsaid as to the actual condition at the west end of defendant's drainage culvert, and as to the place where defendant was stepping when he fell. Plaintiff's testimony at best tends to show the fact that generally there was a level shoulder between the edge of the ballast and the crest of the dump supporting defendant's tracks. This level shoulder was supposed to be kept there so that section men might have a safe place to walk when working. There were flat surfaces across the ends of culverts, but not "like" the shoulders were. Considered from a standpoint most favorable to plaintiff, it reasonably could be said the flat surface across the west end of the culvert in question was narrower than elsewhere along the shoulder, and the vibration of trains had loosened and shaken down some gravel or crushed rock so as to make an inclined surface down to or near the end of the culvert. Plaintiff's testimony, which we have quoted in question and answer form, *supra*, was support for a conclusion that plaintiff slipped on gravel "right up next to the ties"; however, at another time while testifying, plaintiff said, "I didn't back up east, next to the rails." Even so, the condition of the culvert was not shown to have been unsafe for workmen in the ordinary use of the area in maintaining the tracks, including the firing and attending the firing of "spots" of weeds along the shoulder and incline of the dump. Can it be correctly said that a reasonably careful and prudent person would assume that loose gravel or crushed rock, shifted down on the shoulder at the culvert by the vibration of trains, would subject section men to an unreasonable hazard, accustomed as section men are to moving over tracks, ties and ballast in their multiple duties in the maintenance of the line? It is established that the standard of care must be commensurate to the dangers of the business. Less diligence is required where the danger is slight than where great. *Frizzell v. Wabash R. Co.*, 8 Cir., 199 F. 2d 153. It

is true plaintiff was confronted by an emergency, in a sense; but, as we shall see, it was an emergency brought about by himself.

Nor was there evidence tending to show that the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burning weeds. See and compare *Fore v. Southern Ry. Co.*, 4 Cir., 178 F. 2d 349. Of course, it could be asserted that fire itself is a hazard. But it is not contended that defendant was negligent in starting a fire. And the use of the hand torch in firing the weeds did not make the fire dangerous. Defendant did not start a fire on its right of way and abandon it to sweep at large in changing winds or in swirls of wind caused by passing trains. Defendant had detailed plaintiff to fire the weeds; and, according to his testimony, plaintiff knew it was his primary duty to watch the fire.

It seems to us that the fire—unattended and unwatched as it was—swept northwardly by the wind of the passing train toward defendant's culvert so that plaintiff (who had left the fire unattended) was obliged to move blindly away and fall, was something extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert. And now, after the event, we are obliged to say we think plaintiff's injury was not the natural and probable consequence of any negligence of defendant. And if there was negligence in failing to maintain a sufficiently wide path across the culvert or in permitting that path to become covered with crushed rock or gravel, still plaintiff's evidence is completely lacking in probative facts supporting a conclusion that defendant's negligence, in whole or in part, contributed to plaintiff's injury. *Brady v. Southern R. Co.*, supra, 320 U. S. 476, 64 S. Ct. 232; *Atlantic Coast Line R. Co. v. Anderson*, 5 Cir., 221 F. 2d 548; *Chesapeake & O. Ry. Co. v. Burton*, 4 Cir., 217 F. 2d 471; *Gill v. Pennsylvania R. Co.*, 3 Cir., 201 F. 2d 718; *Fore v. Southern Ry.*

Co., supra, 178 F. 2d 349; Wolfe v. Henwood, 8 Cir., 162 F. 2d 998; Seaboard Air Line R. Co. v. Gentry, Fla., 46 So. 2d 485; Restatement, Torts, § 433.

The judgment should be reversed.

It is so ordered.

Paul Van Osdol,  
Commissioner.

Coil, C., concurs.

Holman, C., concurs.

Per Curiam: The foregoing opinion by Van Osdol, C., is adopted as the opinion of the court. All of the judges concur.

**APPENDIX B.**

**Judgment.**

Entered November 14th, 1955 (R. 437-438).

James C. Rogers,	Respondent,
vs. Appeal from the Circuit Court of the City of St. Louis,	
Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a cor- poration,	Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment; and that the said appellant recover against the said respondent his costs and charges herein expended, and have execution therefor.

**APPENDIX C.**

Filed November 28th, 1955.

(R. 449 to 453.)

In the  
Supreme Court of Missouri,  
Division No. 1.

September Session, 1955.

James C. Rogers,

Plaintiff-Respondent,

vs.

Guy A. Thompson, Trustee, Missouri  
Pacific Railroad Company, a Corpo-  
ration,

Defendant-Appellant.

No. 44,595.

Appeal from the Circuit Court of the City of St. Louis,  
Honorable F. E. Williams, Judge.

**Respondent's Motion to Modify the Opinion.**

A.

Comes now James C. Rogers, Respondent, and moves the Court to modify its Opinion filed herein on the 14th day of November, 1955. At page 4 of its Opinion, the Court quotes a part of plaintiff's testimony dealing with plaintiff's conduct in watching the passing train as follows:

"After the train had gotten approximaely half or two-thirds of the way back, I felt this heat on my face, on the side of my face." At no place in the Opinion does it refer to plaintiff's further testimony that only 2 to 3 sec-



onds time was consumed in watching the passing train, although the record is explicit on that phase of the case. The testimony which Respondent moves the Court to include in its Opinion by quotation or summary is as follows:

“Q. How long was it you were in that position before you felt this flame or the burning process, **how many cars had gone by?** A. **Approximately three or four.**

Q. About how fast would you say that train was moving? A. I would say **thirty-five or forty miles an hour.** It was a rapid speed.” (Emphasis supplied; T. 181.)

For grounds of this motion Respondent states: The Court's Opinion makes the length of time plaintiff directed his attention to the passing train, thus leaving the fire “unattended and unwatched” (Opinion, p. 10), a pivotal fact. As to this fact the language presently employed in the Opinion does not give a complete or accurate account of the factual situation, nor permit fair evaluation of plaintiff's conduct. The testimony which Respondent moves the Court to include in its Opinion by quotation or summary is the **only** evidence in the case which does show the length of time plaintiff watched the passing train before being caught by the flames. Such testimony should, therefore, be included in the Opinion either by quotation or summary.

B.

Respondent further requests the Court to modify its Opinion by quoting or summarizing the record facts with reference to the duties plaintiff was required to perform at the time he was injured. The Opinion now singles out plaintiff's duty to attend the fire, but does not make any reference to the fact that at the very time of injury **another duty was imposed by defendant upon plaintiff to**

“put down everything we were doing, get clear of what we were doing and stand and watch the trains go by for hot boxes.” (T. 20-21, 88-90.)

For grounds for said motion, Respondent states: The Court in its Opinion completely overlooks the above testimony which we believe is pregnant with significance. This testimony demonstrates that the task of watching the passing trains for hot boxes was not voluntarily assumed by plaintiff, nor was it self-created. It was imposed upon him by defendant. If the performance of it increased plaintiff's peril (the Court holds that it did), then the very imposition of it made defendant's method of doing this work unsafe and dangerous, and it is one of the very important elements of plaintiff's right to recover. Furthermore, it was one of the facts and circumstances to be weighed and appraised by a jury.

For the foregoing reasons, Respondent respectfully moves the Court to modify its Opinion as above indicated.

Respectfully submitted,

Mark D. Eagleton,  
Thomas F. Eagleton and  
Leland Jones,  
3746 Grandel Square,  
St. Louis 8, Missouri,  
Attorneys for Respondent.

**APPENDIX D.**

Filed November 28th, 1955.

(R. 453 to 460.)

In the  
Supreme Court of Missouri,  
Division No. 1.

September Session, 1955.

James C. Rogers,

Plaintiff-Respondent,

vs.

Guy A. Thompson, Trustee, Missouri  
Pacific Railroad Company, a Cor-  
poration,

Defendant-Appellant.

No. 44,595.

Appeal from the Circuit Court of the City of St. Louis,  
Honorable F. E. Williams, Judge.

**Respondent's Motion for a Rehearing, or, in the Alternative, to Transfer to the Court En Banc.**

Comes now James C. Rogers, Respondent in the above-entitled cause, and moves the Court to set aside its Opinion, decision and judgment rendered herein on the 14th day of November, 1955, and to grant Respondent a rehearing herein, or, in the alternative, to transfer this case to the Court en banc.

For grounds of these motions, Respondent respectfully states that material matters of law and fact in this case were overlooked and misinterpreted by the Court as shown by its Opinion previously filed herein. Such matters of law and fact are as follows:

I.

The Court through a misunderstanding of the evidence has reached the erroneous conclusion that plaintiff was injured as a result of "an emergency brought about by himself" (Opinion, p. 9) in leaving the fire "unattended and unwatched" (Opinion, p. 10). All the evidence on the point shows that plaintiff, while performing his duty of watching the passing train for hot boxes, looked away from the fire for only two or three seconds before he was overtaken by the flames. **Defendant**, apparently in recognition of this testimony, **did not request** the Court to give any instructions submitting to the jury the issue of whether or not plaintiff was negligent in failing to attend or watch the fire under these circumstances, although defendant did request and was granted a **sole cause** instruction dealing with plaintiff's alleged failure to guard properly his footsteps while escaping from the fire (see Defendant's Instruction No. 2, T. 421-422). The Court through this misunderstanding has decided this whole case on an issue not warranted by the facts and **not submitted by defendant**.

II.

The Court through a misunderstanding of the evidence has reached the erroneous conclusion that plaintiff was injured as a result of "an emergency brought about by himself" (Opinion, p. 9) in leaving the fire "unattended and unwatched" (Opinion, p. 10).

It was defendant who imposed the duty upon plaintiff to watch the passing trains for hot boxes. This was not a duty voluntarily assumed by plaintiff, nor was it self-created. If the performance of it increased plaintiff's peril (the Court holds that it did), then the very imposition of it made defendant's method of doing this work an improper one, and it is one of the very important elements of plaintiff's right to recover. Under Point VI herein, we

enumerate the six elements which made the method of work adopted by defendant an unsafe and dangerous method, and **the imposition of this duty is one of the elements stressed therein.** It seems incongruous to us that defendant can demand of plaintiff that he temporarily divert his attention to another task for as much as two or three seconds and that he can thereafter be condemned for obeying the very instructions given him by defendant.

### III.

The Court misinterpreted and misconstrued the length of time plaintiff directed his attention to the passing train. The Court wrongfully assumed that plaintiff left the fire "unattended and unwatched" for a substantial period of time. This assumption is contrary to **all** the evidence in the case. Plaintiff's uncontradicted evidence is that **only three or four cars** of the train (T. 181), that is, one-half or two-thirds of the train (T. 23), passed him before he was overtaken by the flames. Since the train was moving 35 to 40 miles per hour (T. 181), a fact also proved by the uncontradicted evidence, it necessarily follows that plaintiff could not have directed his attention to the passing train for more than two or three seconds before the fire reached him.

The erroneous assumption of fact that plaintiff left the fire "unattended and unwatched" (Opinion, p. 10) for a substantial period of time is material. It is upon that erroneous assumption that the Court concluded that plaintiff faced an emergency "brought about by himself" (Opinion, p. 9) and, therefore, not the result of defendant's negligence.

### IV.

The Court misinterpreted and misconstrued the nature of plaintiff's duties: (1) to inspect the passing train for overheated journal boxes and (2) to tend the fire then set



on the shoulder. The Opinion of the Court, in reciting that "plaintiff knew it was his primary duty to watch the fire," misinterpreted plaintiff's testimony as meaning that the duty to watch the fire was then and there more important than the duty to watch the passing train. Such a meaning cannot fairly be given to the testimony of plaintiff, who stated that defendant had issued standing orders to all section hands, including plaintiff, to drop whatever they might be doing whenever a train passed in order to inspect such trains for overheated journal boxes (T. 20-21, 88-90). Plaintiff's testimony was uncontradicted even though one of the witnesses for defendant was its foreman, from whom plaintiff said he had received the standing orders!

The testimony of plaintiff is uncontradicted as to the nature of the two duties he had to perform in the same interval of time. He had either to watch the fire or to watch the train during this interval. He ran to a point of apparent safety in order to perform the duty imposed on him by defendant, to-wit, watching the train for hot boxes. While the duty of attending the fire may have been primary, it was in no sense exclusive. Both duties were highly important. The nature of the instructions given him by the foreman "to put down everything we were doing, get clear of what we were doing and stand and watch the trains go by for hot boxes" (T. 20-21) must be considered in order to evaluate properly plaintiff's conduct. Certainly reasonable minds could differ on this issue. Therefore, it was the province of the jury to weigh and appraise these facts, not as a matter of hindsight, but under the circumstances present at the time plaintiff was trying to carry out both sets of instructions which were conflicting in their very nature.

V.

The Court's conclusion of law and fact that defendant's negligence, if any, was not the proximate cause of plaintiff's injuries was invalid. It was based upon the misinterpretations and misconstructions of fact set out in Sections I and II preceding. The Opinion held that the emergency which caused plaintiff's injuries was of the plaintiff's own making. Since, however, the uncontradicted evidence proves that plaintiff was obeying the instructions of defendant during the two or three second interval he directed his attention to the passing train, it follows that the Opinion is demonstrably incorrect. This error was an integral part of the holding; it is obvious that the error was material.

VI.

The Court overlooked a theory and the law relied upon by plaintiff in both the trial and the appellate courts. In its Opinion, the Court considered the method of work furnished plaintiff as limited to "the use of the hand torch (in itself)" (Opinion, pp. 9-10). It is apparent from the Opinion that the Court mistakenly understood plaintiff's contention to be that the method of work was dangerous because, and only because, the firing was done by means of a hand torch.

Actually, plaintiff's theory and the law, both of which were overlooked in the Opinion, are that defendant's method of work was comprised of the several following factors: (1) that plaintiff was required to burn weeds which had previously been chemically prepared so that they would ignite rapidly; (2) that plaintiff was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required the plaintiff to be in close proximity (within six feet) of the flame; (3) that plaintiff was required to burn the weeds in such close proximity

to defendant's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward plaintiff; (4) that under the circumstances defendant did in fact operate its train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward plaintiff; (5) that defendant did not provide plaintiff with a path or other means adequate for escape from the fire; (6) that under all of these circumstances defendant continued to impose the duty upon plaintiff of inspecting and watching the passing trains for hot boxes.

In overlooking plaintiff's theory and the law, the Court committed a material error by simply holding that there was no evidence "the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burning weeds." The Court thereby disposes of the entire case on the basis of this one element alone, and thus it has failed to consider the other five elements above set forth upon which plaintiff relies for recovery.

## VII.

The Court misinterpreted and failed to apply properly the principles of law in the case of *Bailey v. Central of Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062. The error is material, since the *Bailey* case, decided by the Supreme Court of the United States and controlling upon this Court, clearly holds that the facts and circumstances such as here involved are to be weighed and appraised by the jury.

## VIII.

The Court misinterpreted and misconstrued the case of *Kelso v. W. A. Ross Const. Co.*, 337 Mo. 202, 85 S. W. 2d 527. In discussing the *Kelso* case, the Opinion overlooked the law of that case. The *Kelso* case held that the safety of the method of work cannot be judged apart from the place of work and that the safety of the place of work

cannot be judged apart from the method of work. This error is material because the Court in the case at bar attempted to judge the adequacy of **one** of the elements of the method of work without relating it to the place of work and attempted to judge the adequacy of **one** of the elements of the place of work without reference to the method or kind of work in progress.

For the foregoing reasons, Respondent respectfully prays the Court to set aside its Opinion, decision and judgment rendered herein on the 14th day of November, 1955, and to grant Respondent a rehearing, or, in the alternative, to transfer this case to the Court en banc.

Respectfully submitted,

Mark D. Eagleton,  
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St. Louis 8, Missouri,  
Attorneys for Respondent.

**APPENDIX E.**

**Order Overruling Motions "to Modify the Opinion," "for a Rehearing, or, in the Alternative to Transfer to the Court en Banc."**

Entered December 12th, 1955 (R. 476).

And thereafter and on the 12th day of December, 1955, the following further proceedings were had and entered of record in said cause, to-wit:

James C. Rogers,

Respondent,

vs. No. 44,595.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation,

Appellant.

Now at this day, the Court having seen and fully considered the motions of the respondent for modification of the opinion in the above entitled cause and for a rehearing herein or, in the alternative, to transfer said cause to the Court en Banc, doth order that said motions be, and the same are hereby overruled.



## **APPENDIX F.**

### **State Courts; Appeal; Certiorari.**

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257.

## **APPENDIX G.**

### **The Federal Employers' Liability Act.**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

## APPENDIX H.

### Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 3, 35 Stat. 66; 45 U. S. Code, Sec. 53.

## **APPENDIX I.**

### **Assumption of Risks of Employment.**

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 54.

## APPENDIX J.

### **Actions; Limitations; Concurrent Jurisdiction of Courts.**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. April 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989; 45 U. S. Code, Sec. 56:



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**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, A. D. 195<sup>6</sup>

No. 625-78

**JAMES C. ROGERS,**  
Petitioner,

vs.

**GUY A. THOMPSON, Trustee, MISSOURI PACIFIC**  
**RAILROAD COMPANY, a Corporation,**  
Respondent.

**PETITIONER'S REPLY**

**To Respondent's Brief in Opposition to Petition**  
**for Writ of Certiorari.**

**MARK D. EAGLETON,**  
**THOMAS F. EAGLETON,**  
3746 Grandel Square,  
St. Louis 8, Missouri,  
Attorneys for Petitioner.

# **SUPREME COURT OF THE UNITED STATES.**

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**OCTOBER TERM, A. D. 1955.**

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**No. 625,**

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**JAMES C. ROGERS,**  
Petitioner,

**vs.**

**GUY A. THOMPSON, Trustee, MISSOURI PACIFIC  
RAILROAD COMPANY, a Corporation,**  
Respondent.

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## **PETITIONER'S REPLY**

**To Respondent's Brief in Opposition to Petition  
for Writ of Certiorari.**

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**To the Honorable The Supreme Court of the United States  
of America:**

We think there was ample evidence from which the jury could and did find that the culvert was not properly maintained; that the culvert did not provide adequate footing for the petitioner to move under the circumstances in evidence, and that respondent's failure in this respect was one of the contributing causes of petitioner's injury. Respondent draws a different conclusion from the evidence, but the debatable quality of that issue was for the jury. In any event that issue was not a decisive or controlling one.

It was not incumbent upon the petitioner to prove that the respondent's failure to furnish adequate footing was the sole cause of his injury. That was not the petitioner's theory, nor was it the only element of negligence submitted to the jury. Even if the jury found that the culvert and the walkway were literally perfect, or that the petitioner would have been injured regardless thereof, it was still warranted in finding that the respondent was negligent in adopting an unsafe and dangerous method of work.

The evidence showed that respondent's method of work was unsafe and dangerous in that (a) the petitioner was required to burn weeds which had previously been chemically prepared so that they would ignite rapidly; (b) the petitioner was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required the petitioner to be in close proximity (within six feet) of the flame; (c) the petitioner was required to burn the weeds in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner; (d) the respondent did, in fact, operate his train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward the petitioner; (e) the respondent continued to impose the duty upon the petitioner to stand on the west shoulder and to inspect and watch the passing train for "hot boxes"; (f) the respondent did not provide petitioner with a path or other means adequate for escape from the fire.

The first five of these negligent acts of the respondent caused the petitioner to be placed in a position of imminent peril. The fire came right up in his face (R. 23). This caused him to retreat quickly (R. 23, 28, 63). He threw his left arm over his face, backed away rapidly, six or eight feet, onto the culvert immediately north of him. While thus backing away, he did not and could not look to see where he was going (R. 23, 68). At this time he had fire and smoke in his eyes and could not see (R. 23, 68).

Under these circumstances, petitioner might well have jumped, rolled, dived or done anything else in order to save himself from the ravages of the fire. He could not be expected to stand still and burn. Had he jumped, he still would be entitled to recover even though he jumped from a surface that was perfectly flat. However, he did not jump but moved onto the culvert where he had a right to expect a haven of safety. There he was caused to fall because of the abnormal condition of the culvert due to the sloping crushed rock placed upon it (R. 113).

Respondent emphasizes the fact (Brief p. 9) that the petitioner walked "backwards, blindly and rapidly"; in order to escape the perils of this fire. With fire in his face, it was only natural for him to back away from the fire. Under these circumstances, of course, he could not see and of necessity his movements would have to be rapid if he were to avoid complete envelopment. So what the petitioner did is exactly what anyone would have been expected to do under the circumstances.

Based on the foregoing facts, respondent concludes that it is the petitioner's contention that "every railroad in the United States would be required to maintain a walkway along every mile of its line, wide enough and level enough and safe enough for every employee to walk along, backwards and with his arm over his eyes, even over drainage culverts which are intended to allow water to pass under the railroad right of way rather than to be used as walkways" (Brief, pp. 9, 10).

The petitioner has never made any such ridiculous contention and does not do so now. Petitioner simply states that when respondent subjected the petitioner to the unusual hazards of fire by requiring him to stand in close and dangerous proximity to an oncoming train, which would and did cause said fire to spread rapidly, that then he owed the petitioner the nondelegable and continuing



duty to provide a reasonably safe place in which to perform the tasks assigned to him. Otherwise respondent had no right to compel petitioner to stand on the west shoulder while performing the duty of watching said train for "hot boxes," and when he did so, the method of work became thereby unsafe and dangerous.

We think the condition of this particular culvert increased the petitioner's peril and contributed to his injury. But even if it did not do so, respondent remains liable for his prior acts of negligence in creating the peril which caused petitioner to move and act as he did.

Respondent in his brief does not and cannot defend his conduct in the five respects enumerated above (a) through (e). In discussing this "supposed issue" (Brief, p. 12), respondent simply attempts to justify the use of the hand torch instead of the "weed burning machine." Here again, petitioner is not contending that the use of the hand torch alone endangered his safety. We have spelled out the reasons why respondent's method was unsafe and dangerous and the fact that respondent and the state court ignored them only makes them stand in bold relief.

In arguing that petitioner did not make a submissible case, respondent bases his entire position upon fallacious assumptions. He erroneously assumes that all of his obligations under the law were fulfilled merely because (1) the pathway and culvert might be said to have been reasonably safe for men using the same under circumstances different from those which confronted the petitioner on the occasion in question and (2) the hand torch in and of itself was not a dangerous instrumentality.

Indulging in these assumptions, respondent chooses to ignore the manner, method, place and environment in which the petitioner was then and there required to use the torch, shoulder, pathway and culvert. Petitioner was not merely walking along respondent's tracks performing



a routine task, getting from one place to another, nor was he using the torch at a place free from hazard. In the first place, he was dealing with fire. He was handed an improvised device and compelled to adopt a highly dangerous method of lighting weeds which had been previously sprayed for the very purpose of causing them to ignite and burn rapidly. On top of all of this, another duty was imposed upon him—he was ordered to stand on the west shoulder in close proximity to a passing train in order to watch for "hot boxes." Without any prior experience, he had to contend with an oncoming train which caused the fire to spread rapidly. It afforded him no opportunity for cool and collected judgment. As soon as he heard it whistle, he was required to run away from his position immediately next to the fire in order to comply with the only instruction given to him. The end of the path was at the culvert.

Petitioner did not have as much warning of the approach of the train as if the foreman had called the train in accordance with the customary practice (R. 62), but plaintiff did think that he had plenty of time in spite of the foreman's failure to call the train (R. 62). His thinking, of course, was influenced by his inexperience and his lack of knowledge of the hazards which later confronted him. The fact remains that petitioner's time for performing his two duties was decreased by the foreman's failure. It is absurd to say (Brief, p. 13) that merely because he came "from a rural area of Arkansas" that he should have known exactly what the passing train would do to the fire. He certainly had a right to assume that his foreman would not require him to do two things at one and the same time that could not be accomplished with reasonable safety under the circumstances. Of course he did not know, and had no way of knowing, that the speed of the train and the wind therefrom would cause the intervening space to be enveloped so quickly. Although petitioner did say that

he knew the movement of the train would cause some wind, he thought its distance away from him to the east was such that it would not blow the fire dangerously close to him (T. 86-88). It must be remembered that petitioner had absolutely no experience in doing this type of work, the occasion in question being the very first time petitioner had ever been so employed (T. 15).

Respondent's position is empty for two reasons: First, it is based upon the fallacies already noted. Second, it simply does not deal with the record facts upon which the petitioner relies for recovery. He sets up a straw man in his contention that the place of work was reasonably safe under ordinary circumstances for section men generally but does not deal with the situation that existed at the time of petitioner's injury. Respondent cannot be relieved of his duty because petitioner's work at the place and by the method in question was fleeting or infrequent. *Bailey v. Central Vermont R. Co.* (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The state court's faulty conclusions are due to the fact that it detaches and separates (1) the instrumentalities involved, (2) the place of work and (3) the method of work each from the other. By this process it was able to say that the torch in and of itself was not dangerous; the train was perfectly safe; the culvert was adequate for ordinary purposes. These truisms take on a different meaning, however, when we consider the manner in which they were being used at the time of petitioner's injury. For illustration, a cow is a docile animal; an oil lantern is a simple appliance; barns are common place structures; but we learned through Mrs. O'Leary that they cannot be used successfully in close and dangerous proximity to each other.

The state court's independent resolution of this testimony was illogical, an invasion of the province of the jury, and it is in conflict with the decisions of this Court.

- 7 -

Those decisions, incidentally, are so crystal clear that it is not difficult for a state court to follow its path of duty with reference to the jury's function. When it fails to do so it is not incumbent upon the petitioner to show that the state court's judgment is ~~is~~ shocking to the conscience of this Court" (Brief p. 7). If such a test must be applied, then it can be said truthfully that the state court's judgment herein must be placed in the "shocking category."

Petitioner again prays that the judgment of Division No. 1 of the Supreme Court of Missouri in this cause be reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

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Supreme Court, U.S.  
FILED

AUG 23 1955

JOHN T. FEY, Clerk

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955.

No. [REDACTED] 28

JAMES C. ROGERS,  
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,  
a Corporation,  
Respondent.

On Writ of Certiorari to the Supreme Court of the  
State of Missouri.

## BRIEF FOR PETITIONER.

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# **SUPREME COURT OF THE UNITED STATES.**

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**OCTOBER TERM, A. D. 1955.**

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**No. 625.**

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**JAMES C. ROGERS,**  
Petitioner,

vs. ▶

**MISSOURI PACIFIC RAILROAD COMPANY,**  
a Corporation,  
Respondent.

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On Writ of Certiorari to the Supreme Court of the  
State of Missouri.

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## **BRIEF FOR PETITIONER.**

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### **OPINION OF THE COURT BELOW.**

The opinion of the Supreme Court of Missouri (R. 102-111), is reported as James C. Rogers, Plaintiff-Respondent, v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation, Defendant-Appellant, 284 S. W. 2d 467 . . . Mo. . . . (not yet officially reported).

**STATEMENT OF GROUNDS ON WHICH  
JURISDICTION OF THIS COURT  
IS INVOKED.**

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257 (3), providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a State in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

In this cause petitioner specially set up and claimed a right under a statute of the United States, namely, the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, Secs. 51-60 (R. 1-2). Petitioner asserts that the decision of the Supreme Court of Missouri under this federal statute is not in accord with applicable decisions of this Court.

The judgment of the Supreme Court of Missouri was entered on the 14th day of November, 1955 (R. 101-102), and became final on the 12th day of December, 1955, when the Supreme Court of Missouri overruled petitioner's motion to modify the opinion of the court and overruled petitioner's motion for rehearing and overruled petitioner's motion to transfer to the court en banc (R. 111).

Petition for writ of certiorari was filed on January 14, 1956—within ninety days after entry of judgment, in accordance with the Act of Congress of June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104, 28 U. S. Code, Sec. 2101 (c).

## **STATUTES INVOLVED.**

The statutes involved are:

45 U. S. Code, Sec. 51 (Appendix A).

45 U. S. Code, Sec. 53 (Appendix B).

45 U. S. Code, Sec. 54 (Appendix C).

## **QUESTIONS PRESENTED.**

The questions presented for review are:

(1) Whether the petitioner who had no experience whatsoever in firing weeds along the respondent's right-of-way (R. 9) and who theretofore had never seen anyone attempting to do so (R. 9) was entitled to have the negligence of the respondent submitted to the jury where the uncontradicted evidence showed that the respondent required the petitioner (R. 12, 13, 29, 30) to be upon said right-of-way in close and dangerous proximity to a passing train of the respondent which caused the fire to blow toward the petitioner and thus to endanger his safety (R. 14).

(2) Whether the petitioner was entitled to have the jury consider the respondent's negligence in creating the aforesaid dangers, thereby causing the petitioner to retreat and move quickly from the place where he was standing while inspecting the passing train for "hot boxes" and thus to use as a place of work a part of the respondent's right-of-way covered with loose and sloping gravel which did not provide adequate and sufficient footing for the petitioner to move in a reasonably safe manner.

(3) Whether the petitioner, under the circumstances aforesaid, was entitled to have his case submitted to a jury under evidence showing that the respondent's method of work was unsafe and dangerous in that (a) the petitioner was required to burn weeds which had previously

been chemically prepared so that they would ignite rapidly; (b) the petitioner was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required the petitioner to be in close proximity (within six feet) of the flame; (c) the petitioner was required to burn the weeds in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner; (d) the respondent did in fact operate its train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward the petitioner; (e) the respondent did not provide the petitioner with a path or other means adequate for escape from the fire; (f) the respondent continued to impose the duty upon the petitioner to stand on the west shoulder and to inspect and watch the passing train for "hot boxes."

(4) Whether the state court has narrowed the concept of "proximate cause" under the Federal Employers' Liability Act and has usurped the function of the jury in holding as a matter of law that the petitioner's injury was not proximately caused by negligence of the respondent.

### **STATEMENT OF THE CASE.**

Under the pleadings (R. 1-4) it was admitted that the petitioner's duties as an employee of the respondent were in furtherance of the interstate commerce transportation business of the respondent and that, by reason thereof, the petitioner and the respondent were at all times herein mentioned engaged in interstate commerce and were subject to the Federal Employers' Liability Act, 45 U. S. Code, secs. 51-60.

The petitioner, 27 years old at the time of trial, married, father of one child (R. 5), brought this suit to recover damages for injuries sustained at Garner, Arkansas, through the negligence of the railroad, in failing to use



ordinary care to furnish the petitioner a reasonably safe place in which to work and a reasonably safe method of doing said work. The petitioner at the time of injury was assigned to the task of burning weeds by the use of a hand torch. He had no warning or preparation as to how to safeguard himself from the perils of fire fanned up by a passing train operated by the respondent. The injury occurred on July 17, 1951, about 11:00 A. M. (R. 6).

Petitioner's work for respondent was being performed along respondent's two main tracks, which ran north and south (R. 7). There was a shoulder west of the southbound track (R. 8) and another east of the northbound track (R. 79, 80).

The petitioner had two duties to perform at one and the same time: (1) to inspect passing trains for "hot boxes," and (2) to attend the fire then set on the shoulder. The performance of both of these duties required petitioner to be upon the west shoulder of the respondent's right-of-way (R. 12, 13).

To the south, west and north of the petitioner were weeds (R. 16) prepared for rapid ignition by chemical spray previously applied by the respondent (R. 18, 19, 27, 41). These dead weeds were thicker and taller toward the north, the direction toward which petitioner was working in burning the weeds (R. 41). A culvert was located only 30 or 35 yards north of the petitioner (R. 11). The west shoulder, on which petitioner performed his duties, was flat and three or three and one-half feet wide (R. 8, 9), offering exit from the flames, which were to the south of petitioner, only as far north as the culvert from which he fell (R. 14, 15, 36, 37). At the culvert such exit ended, and there was no flat surface or walkway on the culvert (R. 14, 15, 36, 37).

This was the first time the petitioner had ever attempted to do said work and he had never watched anyone attempt to do it theretofore (R. 9). He had been given this hand

torch only 30 to 45 minutes before the injury occurred (R. 10). The hand torch itself, which respondent furnished petitioner, was essentially a quart tin can with two spouts opposite each other and at approximately 45-degree angles from the top side of the can (R. 9). In one spout there was a 3-foot handle (R. 9, 16). In the opposite spout there was a wick of "rags and stuff" (R. 9). This type of torch was not the type used to burn weeds on the shoulders of rights-of-way (R. 10, 17, 26), but, rather, was the type used for burning small areas of grass away from the track to form clearings for the stacking of ties (R. 10).

On this occasion the petitioner "was not notified by anyone" of the approach of the northbound train involved herein (R. 15, 20). Ordinarily, the section foreman would notify his crew to clear the tracks prior to the approach of a train (R. 15). That was the foreman's job and the section crew would continue working until he called "train" (R. 15, 20).

Petitioner had been instructed by the foreman not to cross to the east when a train approached because "the sound of one train would deaden the sound of another one that possibly would come from the other way" (R. 13). He was further instructed to "always stand on the shoulder" (R. 13). The only other instructions given to petitioner were to the effect that whenever a train was passing to "put down everything" he was doing and watch for "hot boxes" (R. 12, 29, 30). Standing on the west shoulder, as he had been directed, would place the petitioner in close proximity to the tracks whereon respondent's train was moving (R. 11, 12).

When petitioner heard the whistle of a northbound train (the only notice he had) he immediately ran a distance of 30 to 35 yards to the north before he set down his torch; this was the amount of space intervening between him and the culvert that was north of him (R. 11, 13, 14). While

running to the north, the petitioner necessarily had his back to the fire which was south of him. In thus moving to the north, petitioner moved to the only direction that was open to him. He could not move to the south, because that direction was blocked by the fire (R. 28). He could not move to the west, because doing such would have placed him in weeds which were chemically prepared for burning and they were immediately adjacent to the fire (R. 18, 19, 27, 28). He could not move to the east, because he had been specifically instructed by the foreman not to stand on, or close to the adjacent track if a moving train was on the other track (R. 13). Petitioner ran the distance of 30 to 35 yards to the north in order to get far enough away from the fire to clear himself (R. 14), and when he reached this point he thought he was "plenty far enough" to clear himself of the fire "or any danger of the fire and it was time to start to watch these journals" (R. 14). He took his position on the west shoulder where he was told to stand (R. 13).

At this instant the northbound engine had already passed him (R. 14). He began watching the passing train for "hot boxes" under instructions theretofore given to him by his foreman. While thus watching for said "hot boxes" (a period of 2 or 3 seconds) approximately three or four cars went by at a rate of 35 to 40 miles per hour (R. 34). He was then overtaken by "fire right up in" his face (R. 14, 16, 21). This caused him to retreat quickly (R. 14). He threw his left arm over his face, backing away rapidly, six or eight feet onto the culvert immediately north of him, at which time he fell because of the inadequacy of the footing there provided him (R. 14, 15, 16, 23, 32, 33, 40).

The surface of the culvert was covered with a sloping substance of loose rocks or ballast (R. 15, 24, 33, 34, 38) which had been shaken down onto the culvert by the vibration of trains (R. 36). Consequently there was no flat sur-

face or walkway over the top of the culvert (R. 15, 33, 36, 38), although petitioner testified a flat pathway over culverts was customary (R. 14, 32, 36, 40), and that the section men had been instructed by the foreman to keep the culvert free from rocks "so the men would have a safe place to walk" (R. 33). This was corroborated by the foreman's testimony that the section men kept the edge of the ballast lined up straight (R. 74, 75, 76, 77, 81).

When petitioner stepped upon the crushed rock along the western part of the culvert, the crushed rock rolled out from under his feet, causing him to fall and to be injured (R. 15, 24, 30, 31). He did not and could not look to see where he was going (R. 14, 23, 24). At this point he had fire and smoke in his eyes and could not see (R. 14, 24).

The petitioner, who had no previous experience, did not know that the passing train would cause sufficient wind to fan or blow the fire (R. 14, 28). He knew the train would cause wind (R. 28), but thought the wind would not affect the fire too much because there was another track (the southbound track) between the train and the petitioner (R. 29, 11).

The foreman was aware that the weeds which he ordered the petitioner to burn were dead, having been killed by a prior chemical spray (R. 60). The foreman had a great deal of experience in doing this kind of work and had for over twenty years used a flame-thrower machine to fire the shoulders (R. 9, 26, 27, 71). This machine permits the employees to remain in a place of safety as they are stationed on a part of the machine approximately 15 or 20 yards away from the fire (R. 10). The petitioner testified that was the normal method of doing said work (R. 9). The foreman, however, testified that the flame-thrower had been discarded some years before the date of accident because it caused too much damage along the right-of-way (R. 68).



The petitioner testified he knew it was his primary duty to watch the fire (R. 30), and that he was never told "to completely ignore a fire you set" (R. 29); but the positive order to watch for "hot boxes" remained in effect and he was given no warning or instructions as to the manner of performing those two tasks simultaneously. Neither the foreman nor any other witness testified or even intimated that the petitioner's attempt to perform these two tasks was improper or different from what was expected of him.

The petitioner alleged (R. 2) "that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid."

The respondent in its answer (R. 3, 4) denied its own negligence and alleged that the petitioner's injuries were directly caused by the petitioner's own negligence and carelessness in four respects: (a) in failing to keep a lookout ahead and laterally in the direction in which he was walking (R. 4); (b) in failing to maintain secure footing in the circumstances under which he was working and performing his duties (R. 4); (c) in walking backwards or sidwards without looking in the direction in which he was walking and without ascertaining for himself the security of his own footing (R. 4); (d) in making a mis-step at a time when the petitioner was familiar with the conditions under which he was required to work and the structure of the ground upon which he was working and in thus failing to protect himself from slipping and falling (R. 4).

The respondent did not allege or claim in its answer that the petitioner was negligent in failing to "attend or watch" the fire.



The trial court submitted the case to the jury under written instructions and the jury returned a unanimous verdict in favor of the petitioner and assessed his damages in the sum of Forty Thousand Dollars (\$40,000.00) (R. 97). Before it could return a verdict, the jury was required to find that the respondent was negligent in failing to use ordinary care to provide the petitioner with a reasonably safe place in which to work and a reasonably safe method of doing said work under the circumstances aforesaid (R. 93, 94).

At the request of the respondent, the issue of the petitioner's alleged negligence in failing to guard properly his footsteps was submitted to the jury (R. 94). The respondent did not request the trial court to give any instructions authorizing the jury to find that the petitioner was guilty of negligence in leaving the fire "unattended and unwatched" or in creating any emergency, and no such instruction was given by the trial court of its own motion (R. 93 through 97).

The trial court accepted the verdict of the jury and entered judgment thereon. Thereafter, the respondent's motion for a new trial was overruled (R. 100). The respondent appealed to the Supreme Court of Missouri, which court reversed the judgment (R. 101, 102) holding that the petitioner had failed to make a submissible case.

## SUMMARY OF ARGUMENT.

It is elemental that respondent owed petitioner the duty to use ordinary care to furnish the petitioner (1) a reasonably safe place to work and (2) a reasonably safe method of work. This duty was a continuing duty and the respondent was not relieved of its obligations because the petitioner's work at the place and by the method in question was fleeting or infrequent. *Bailey v. Central Vermont R. Co.* (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The record contains ample evidence to sustain the jury's finding that respondent violated this duty to petitioner. The inexperienced petitioner was required by the respondent to burn weeds which had previously been chemically prepared so that they would ignite rapidly. For the purpose of igniting the weeds, respondent furnished petitioner a crude hand torch which required petitioner to be within six feet of the flame. The petitioner was required to carry on this burning operation in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner. An additional duty was imposed upon him—to stand on the west shoulder and to inspect and watch passing trains for "hot boxes." While petitioner was thus performing the concurrent and conflicting duties imposed upon him, the respondent operated its train along the said track at a speed of 35 to 40 miles per hour and caused the fire to blow upon and to overtake the petitioner. Of necessity the petitioner retreated quickly from the fire, and was caused to fall on the abnormal surface of the culvert, which was not properly maintained and which did not provide petitioner a reasonably safe path or other means adequate for escape from the fire.

In looking to the facts surrounding petitioner's injury, the combined dangers involved, the place of work, and the

method of work, cannot be detached, separated and isolated each from the other. All the factors involved must be regarded together, in the same relationship as existed at the time of petitioner's injury. Respondent's negligence in creating, through a combination of factors, the hazard which caused petitioner's injury, is not, of course, excused merely because detached elements of the hazard may not have been dangerous in themselves.

The state court's decision is the result of an independent resolution of the evidence. The practice of a lower court in reweighing conflicting evidence and substituting its own determination for that of the jury is in direct conflict with the decisions of this Court. *Wilkerson v. McCarthy* (1949), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Lavender v. Kurn* (1946), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Bailey v. Central Vermont R. Co.* (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tennant v. Peoria & Pekin Union R. Co.* (1944), 321 U. S. 79, 64 S. Ct. 409, 88 L. Ed. 520.

Respondent's negligence was clearly the proximate cause of petitioner's injury. Furthermore, under the Federal Employers' Liability Act, the concept of proximate cause is broadened and the employer is liable for injuries resulting "in part" from its negligence. In any event, a jury of fair-minded men could and did find that said negligence contributed "in part" to cause petitioner's injuries.

## ARGUMENT.

**Respondent Owed Petitioner the Continuing and Non-delegable Duty to Use Ordinary Care to Furnish Him a Reasonably Safe Place to Work and a Reasonably Safe Method of Work, and Respondent Was Not Relieved of Its Obligations Merely Because Petitioner's Work at the Place and by the Method in Question Was Fleeting or Infrequent.**

This action was based on a violation of the well-recognized duty of the master to use ordinary care to furnish a servant a reasonably safe place to work and a reasonably safe method of work. The pleadings (R. 1-4), evidence (R. 5-91), and submission (R. 93-96), were to this effect.

It is elemental that the respondent owed the petitioner the duty to use ordinary care to furnish the petitioner (1) a reasonably safe place to work and (2) a reasonably safe method of work. This duty was a continuing duty and the respondent was not relieved of its obligations because the petitioner's work at the place and by the method in question was fleeting or infrequent. *Bailey v. Central Vermont R. Co.* (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The mere fact that the petitioner was performing a task which was not of daily routine did not lessen the dangers attached thereto, nor change the above standards of law. The continuing duty of the respondent followed the petitioner wherever he might go in the course of performing the work assigned to him by the respondent.

**The Record Facts Establish Respondent's  
Violation of Its Duty.**

The record facts will show in clearest detail respondent's violation of its said duty toward petitioner. In looking to the record, of course, to determine

" . . . whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Wilkerson v. McCarthy* (1949), 336 U. S. 53, l. c. 57, 69 S. Ct. 413, 93 L. Ed. 497, l. c. 502.

Respondent imposed duties upon petitioner which required him to be on the shoulder west of the tracks (R. 10, 12, 13) with fire at least six feet south of him (the length of plaintiff's arm plus the three-foot length of the handle on the hand torch [R. 9, 16]). Petitioner was handed this improvised torch and compelled to adopt a highly dangerous method of lighting weeds which had been previously sprayed for the very purpose of causing them to ignite and burn rapidly (R. 18, 19, 27, 41). On top of all this, another duty was imposed upon petitioner—he was ordered to stand on the west shoulder in close proximity to a passing train (R. 11, 12) in order to watch for "hot boxes" (R. 12, 29, 30)—a duty which petitioner was not free to ignore since it was imposed upon him by the respondent.

This was the first time petitioner had ever attempted to perform this duty (R. 9) and he had never seen anyone else attempt to perform it (R. 9) and yet, with the inexperienced petitioner conducting a dangerous burning operation on the west shoulder, respondent then operated a train in such a direction and at such a speed as would, and did, cause the flames to blow toward the north into the



yet-unburned, taller, thicker, chemically-prepared dried weeds (R. 41). Without any prior experience, petitioner had to contend with an oncoming train which caused the fire to spread rapidly. He was afforded no opportunity for cool and collected judgment. Petitioner did not have as much warning of the approach of the train as if the foreman had called the train in accordance with the customary practice (R. 15). As soon as petitioner heard the train whistle, he was required to run away from his position immediately next to the fire in order to comply with the instruction to watch for "hot boxes." Petitioner could not move to the south and into the fire (R. 28), nor to the west, which the fire would embrace (R. 18, 19). He was prohibited by positive instructions from crossing over the tracks to the east because of the dangers incident to such crossing (R. 13). Consequently, petitioner ran to the north—to the end of the path at the culvert (R. 11, 13, 14). Petitioner thought he was a safe distance away from the fire when he was overtaken by the flames while watching for "hot boxes" on the passing train (R. 14). Of course, he did not know, and had no way of knowing, that the speed of the train and the wind therefrom would cause the intervening space to be enveloped so quickly (R. 28, 29).

Petitioner had been watching the train for only 2 or 3 seconds before he was overtaken by the flames. The uncontradicted evidence shows that only 3 or 4 cars of the train (R. 34) passed during the short period while the petitioner, pursuant to positive orders, was watching for "hot boxes." Since the train was moving at the rate of 35 to 40 mph. (R. 34) it was traveling at the rate of 51 to 59 feet per second. Therefore, it would travel 3 or 4 car lengths (120-160 feet) in 2 or 3 seconds. Only during this short interval of 2 or 3 seconds could it be said that petitioner left the fire "unattended and unwatched."

These undisputed facts, which were ignored by the state court in its opinion, are decisive of the issue that respondent created an emergency situation by compelling the petitioner to watch for "hot boxes" at a time when it was highly dangerous for him to do so. It was the imposition of these concurrent and conflicting duties that made the respondent's method of doing the work an unsafe and dangerous one. These conflicting duties were imposed upon the petitioner by the respondent at the very time when the respondent caused its train to move at such rate of speed that it did fan the fire toward the petitioner, whose place of work on the west shoulder was selected by the respondent (R. 10, 13).

Conceding that the petitioner understood that his "primary" duty was to attend the fire and that he was not told to ignore the fire completely (R. 29), it does not follow that said duty was exclusive nor that he could ignore his concurrent duty, that of watching for "hot boxes."

The various labels on duties, whether they be called "first," "primary," "positive" or anything else, must be considered and evaluated in the light of all of the circumstances present. Of necessity, for a two or three second interval, the petitioner was required to give attention to one duty rather than to the other. To illustrate: A locomotive fireman is under the duty to watch his boiler and the amount of steam that is coming up and at the same time is under the duty to keep a lookout while approaching public crossings. It could well be said that the duty of watching the boiler and the steam is his "primary" or "first" duty. On the other hand, we know that the safety of the train and its passengers, as well as the safety of the public, depends upon the performance of his "positive" duty to keep a vigilant watch while approaching public crossings. Can it be said that while the fireman is looking out of the window for two or three seconds in the perform-

ance of his "positive" duty, he is guilty of negligence in not performing the "primary" duty of watching the steam during that very same interval of time? The answer is "No," because of the very nature of the duties. A jury must appraise an employee's conduct in the light of all the circumstances in evidence. It must be remembered, too, that the petitioner who was not even charged with negligence in leaving the fire "unattended and unwatched" cannot have his recovery defeated by contributory negligence.

Having created, by its negligence in failing to provide petitioner a reasonably safe place in which to work and a reasonably safe method of doing said work, the emergency situation in which petitioner found himself, when the fire, fanned by the swift moving train, overtook him, respondent compounded its negligence by its failure to provide petitioner with a path or other means adequate for escape from the fire. When the fire came right up in petitioner's face (R. 14) he was caused to retreat quickly (R. 14). He threw his left arm over his face, backed away rapidly, six or eight feet onto the culvert immediately north of him. While thus backing away, petitioner did not and could not look to see where he was going (R. 14, 23, 24), because at this time he had fire and smoke in his eyes and could not see (R. 14, 24). Under the circumstances, petitioner might well have jumped, rolled, dived or done anything else in order to save himself from the ravages of the fire. He could not be expected to stand still and burn. However, he did not jump but moved onto the culvert where he had a right to expect a haven of safety. There petitioner was caused to fall because of the abnormal condition of the culvert due to the sloping crushed rock placed upon it and the absence of a customary flat surface or walkway (R. 15).

And respondent, in its answer (R. 4), has singled out this fleeting instant--while petitioner was hurrying, with

• smoke-filled eyes, to escape the hot breath of the fire, which was already right up in his face—for its only assertion of contributory negligence, which was directed at petitioner's foot work in this perilous moment.

• Just plain common sense tells us that one who is exposed to the perils of fire in the performance of any duty should be provided with a reasonably safe avenue of escape. Certainly any prudent person would reasonably anticipate that when a train causes the fire to blow on an employee who is required to stand in close and dangerous proximity to said train that he might have to retreat quickly therefrom or else be consumed thereby. The shoulder and pathway were the same to the petitioner as the fire escape on a hotel building is to anyone lodged therein. It would be absurd to say that the hotel owner does not have to use ordinary care to maintain a fire escape in reasonably safe condition simply because said owner does not know when, where or how a fire will start.

• Certainly the record facts, as outlined above, contain an abundance of evidence to support the trial court judgment in favor of petitioner. It was, and is, petitioner's theory of liability that his place of work was unsafe considering the nature, type and method of work. It was also petitioner's theory that the method of work was unsafe considering the place where it was to be done. This twofold theory was submitted, in the conjunctive, to the jury (R. 93).

Petitioner's **place of work** necessarily included (1) the shoulder west of the tracks and the dead, dried, highly inflammable burning weeds located thereon, north to the point on the culvert where plaintiff sustained his injuries; (2) the culvert on which a slope of crushed, loose rock was the only possible route of escape from fire blown north-



wardly along the aforesaid west shoulder. Clearly the evidence established, and the jury was entitled to find, that the place of work thus furnished petitioner was not reasonably safe; that respondent was negligent in furnishing the place of work; and that petitioner sustained injuries as a result of respondent's negligence.

And, looking to the other side of the coin, the evidence showed that respondent's **method of work** was unsafe and dangerous in that (a) the petitioner was required to burn weeds which had previously been chemically prepared so that they would ignite rapidly; (b) the petitioner was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required petitioner to be in close proximity (within six feet) of the flame; (c) the petitioner was required to burn the weeds in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner; (d) the respondent did, in fact, operate its train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward the petitioner; (e) the respondent continued to impose the duty upon the petitioner to stand on the west shoulder and to inspect and watch the passing train for "hot boxes"; (f) the respondent did not provide petitioner with a path or other means adequate for escape from the fire. Surely, then, the jury could find that the six items listed above cumulatively constituted the method of work which respondent furnished petitioner; that the method of work was not reasonably safe at the place where it was employed; that respondent was negligent in furnishing the method of work; and that petitioner sustained injuries as a proximate result of respondent's negligence.

The state court, however, ignored the manner, method, place and environment in which the petitioner was then and there required to use the torch, shoulder, pathway and



culvert, and disposed of the vital issues—whether the respondent exercised ordinary care to furnish the petitioner a reasonably safe place in which to work and a reasonably safe method of work—simply by holding that the hand torch, in itself, was safe and did not make the fire dangerous (R. 110), and that the pathway and culvert were not unsafe for ordinary uses under ordinary circumstances (R. 110).

Such a simplification of the issues is unjustified. The petitioner does not contend that the hand torch alone endangered his safety. The other facts and circumstances in evidence and their peculiar nature cannot be disregarded. The petitioner, an inexperienced employee, was told to stand on the west shoulder. He was instructed to watch the passing train for "hot boxes." This necessarily brought him into close and dangerous proximity to the passing train. He did not know the dangers attached to this work and had received no warnings or any other preparation for it. While thus following instructions, he was imperiled by the fire and flames which were blown toward him by the passing train controlled by the respondent. His peril was caused by three things: (1) respondent's demand that the inexperienced petitioner stand and work upon the west shoulder in close proximity to the tracks upon which a train was then and there being operated while the weeds were burning nearby; (2) respondent's sending a train, under the circumstances aforesaid, at such rate of speed that it did cause the fire to fan and spread rapidly; and (3) the failure of the respondent to provide any reasonably safe means of escape.

The state court's faulty conclusions are due to the fact that it detaches and separates (1) the combined dangers involved, (2) the place of work and (3) the method of work each from the other. By this process it was able to say that the torch in and of itself was not dangerous; the

train was perfectly safe: the culvert was adequate for ordinary purposes. These truisms take on a different meaning, however, when we consider the manner in which they were being used at the time of petitioner's injury. For illustration, a cow is a docile animal; an oil lantern is a simple appliance; barns are commonplace structures; but we learned through Mrs. O'Leary that they cannot be used successfully in close and dangerous proximity to each other.

### **The Issue of Negligence Was for a Jury's Determination.**

The state court's independent resolution of the evidence was illogical, an invasion of the province of the jury, and in direct conflict with the decisions of this Court. In the words of Mr. Justice Black, in *Wilkerson v. McCarthy*, *supra*,

“its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony” (336 U. S. 53, l. c. 55).

The decisions of this Court have made crystal clear a state court's path of duty with reference to the jury's function. The applicable rule of law was authoritatively stated by Mr. Justice Murphy in *Lavender v. Kurn* (1946), 327 U. S. 645, l. c. 653, 66 S. Ct. 740, 90 L. Ed. 916, l. c. 923:

“Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But

where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

This Court expounded the same principles in *Wilkerson v. McCarthy*, *supra*:

"This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. . . . It was because of the importance of preserving for litigants in *FELA* cases their right to a jury trial that we granted certiorari in this case" (336 U. S. 53, l. c. 55).

In *Bailey v. Central Vermont R. Co.*, *supra*, Mr. Justice Douglas declared:

"The jury is the tribunal under our legal system to decide that type of issue . . . as well as issues involving controverted evidence. . . . To withdraw such a question from the jury is to usurp its functions.

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' *Jacob v. New York*, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . . To deprive

these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them" (319 U. S. 350, l. c. 353-354).

The similarity between the theories of recovery relied on and the evidence in support thereof in the case at bar and in the Bailey case, *supra*, is indeed striking, as evidenced by paraphrasing a portion of the opinion in the Bailey case:

"The nature of the task which *Rogers* undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand . . .—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing *Rogers* with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury" (319 U. S. 350, l. c. 353). (Words in italics paraphrased.)

See also *Tiller v. Atlantic Coast Line R. Co.* (1943), 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Schulz v. Pennsylvania R. Co.* (1956), 350 U. S. 523, 100 L. Ed. 430, 76 S. Ct. 608.

This Court has deplored and condemned the practice of a lower court in reweighing conflicting evidence and substituting its own determination for that of the jury:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is



the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & Pekin Union R. Co.* (1944), 321 U. S. 29, l. c. 35, 64 S. Ct. 409, 88 L. Ed. 520, l. c. 525.

**Respondent's Negligence Was the Proximate Cause of  
Petitioner's Injury Under the Federal Employers'  
Liability Act.**

Certainly there should be no question as to the causal relationship between respondent's negligence and petitioner's injury in view of the broadened concept of "proximate cause" under the Federal Employers' Liability Act.

"The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus de-



terminated the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term is understood in the act, liability of the employer shall follow, irrespective of the other factors causally related in whole or in part from negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.' " The above quotation is from Roberts, "Federal Liabilities of Carriers," Sec. 869, as found in *Eglsaer v. Scandrett et al.* (7 Cir., 1945), 151 F. 2d 562, l. c. 565, in which that court further states:

The statute "provides that if the railroad's negligence '*in part*' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'casual relation'—if the injury or death resulted '*in part*' from defendant's negligence, there is liability.

"The words '*in part*' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident" (151 F. 2d 562, l. c. 566).

We believe that the state court's conclusion of law and fact that respondent's negligence was not the cause of the petitioner's injuries was invalid under the evidence and under any definition of "proximate cause." Certainly, a jury of fair-minded men should be permitted to find under the statute that respondent was negligent and that said negligence contributed "in part" to cause the petitioner's injuries.

### **The State Court's Opinion.**

Inasmuch as this matter is before this Court because of petitioner's claim that the opinion of the Supreme Court of the State of Missouri (R. 102-111) is erroneous, we deem it our duty to point out the errors into which the state court fell.

A. The state court, in asserting that petitioner was injured through an emergency brought about by himself in leaving the fire "unattended and unwatched" (R. 110), based its opinion upon a theory not raised by the pleadings (R. 1-4) or the evidence (R. 5-91) and an issue that was not submitted to the jury (R. 93-97). This conclusion was not warranted by the evidence. The record facts show that petitioner, while running north thirty to thirty-five yards in an effort to get far enough away to clear himself of the fire (R. 14), necessarily had to have and did have his back to the fire; that he then stood on the west shoulder **where he was told to stand** (R. 13) for only two or three seconds before he was overtaken by the flames; that during this few seconds' interval he was following the instructions of the respondent theretofore given him "to put down everything" and watch for "hot boxes" on the passing trains (R. 12, 29, 30).

B. The state court erred in detaching and separating the combined dangers involved, the place of work and the

method of work each from the other. The state court thus erroneously assumed that all of respondent's obligations under the law were fulfilled merely because (1) the pathway and culvert were reasonably safe for men using the same under circumstances **different** from those which confronted the petitioner on the occasion in question; (2) the hand torch in and of itself was not a dangerous instrumentality; and (3) the operation of the train, under **ordinary** circumstances, was safe. The state court thus failed to appreciate that, although the detached elements of the hazard may not have been dangerous in themselves, extreme danger resulted from the combination of the elements. In isolating and detaching the factors which lead to petitioner's injury, the state court ignored the manner, method, place and environment in which the petitioner was then and there required to work. The relationship of these elements is established by the evidence and their separation is unjustified as well as illogical.

C. The state court, in deciding that petitioner's injuries were not related to the negligence of the respondent, not only usurped the province of the jury, but it failed to recognize the broadened concept of "proximate cause" under the Federal Employers' Liability Act. As we discussed at some length above, the concept of proximate cause under the Federal Employers' Liability Act is enlarged by the wording of the statute and makes the employer liable for his negligence, even though some other factor may logically be said to be more influential in producing the injury. Certainly the evidence permitted a jury of fair-minded men to find under the statute that respondent was negligent and said negligence contributed "in part" to cause petitioner's injuries.

### **CONCLUSION.**

For the reasons herein given, petitioner respectfully submits that the judgment of the Supreme Court of Missouri should be reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

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## **APPENDIX A.**

### **Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees From Negligence; Definition of Employees.**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.



## APPENDIX B.

### Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 3, 35 Stat. 66; 45 U. S. Code, Sec. 53.

## APPENDIX C.

### Assumption of Risks of Employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 54.

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# **SUPREME COURT OF THE UNITED STATES.**

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**OCTOBER TERM, A. D. 1956.**

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**No. 28.**

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**JAMES C. ROGERS,**  
Petitioner,

vs.

**MISSOURI PACIFIC RAILROAD COMPANY,**  
a Corporation,  
Respondent.

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**On Writ of Certiorari to the Supreme Court of the  
State of Missouri.**

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## **PETITIONER'S REPLY BRIEF.**

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### **In Re Cases Cited by Respondent.**

No effort will be made here to discuss the cases cited by the respondent in its brief. The factual situations in those cases are so dissimilar to the case at bar that they shed no light upon it. No case is cited which can or does overrule the pronouncements of this Court in *Lavender v. Kurn* (1946), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Bailey v. Central Vermont R. Co.* (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Wilkerson v. McCarthy*

(1949), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. The law is firmly established and there really is only one question submitted for the Court's attention: That is, whether or not the facts in the case at bar warrant the submission of the case to the jury. The above cited cases hold in effect that we need look only to the evidence and reasonable inferences which tend to support the case of the petitioner and that whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusions. The facts here are decisive of the whole case.

**Respondent Erroneously Contends That Petitioner's Present Position Is Different From His Position in the Trial Court.**

It is apparent that respondent labors under a basic misconception as to petitioner's position, and a complete answer to respondent's argument may be had by resorting to the record.

In its brief, respondent attempts to escape the effect of its negligence by detaching and separating the dangers which caused petitioner's injury, and by dismissing as "new contentions" petitioner's position that all the elements of hazard must be taken together.

Respondent claims that petitioner did not rely upon the acts of negligence which petitioner now argues to this Court, and that he neither stated them in his petition nor submitted them to the jury which heard the case (Respondent's brief, page 12). There is no better way to determine whether petitioner is making "new contentions" than to look at the record. For the convenience of the Court we herewith quote verbatim the pertinent parts of the record touching these matters.



When petitioner filed his action in the Circuit Court of the City of St. Louis, Missouri, on May 27, 1953, he described respondent's negligence, in paragraph five of his petition, in these words (R. 2):

"5. That on the said 17th day of July, 1951 plaintiff, in the scope and course of his said employment for the defendant, was engaged in burning weeds using a hand torch along defendant's right-of-way, a short distance north of 'Garner Crossing' in or near the City of Garner, State of Arkansas, and in so doing was **required to work** at a place in close proximity to defendant's railroad tracks, whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and requiring plaintiff to move away from said danger; that on the occasion herein mentioned a train did pass and did cause plaintiff to thus retreat and move quickly from the place where he was then working and to use as his place of work a part of defendant's said right-of-way adjoining its tracks that was covered with loose and sloping gravel which did not provide adequate or sufficient footing for plaintiff to thus move or work under the circumstances. Plaintiff states that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid." (Emphasis supplied.)

When this case was submitted to the jury, which returned a unanimous verdict for petitioner, the verdict-directing instruction was as follows (R. 93-94):

"The Court instructs the jury that under the law applicable to this case, it was the positive, non-delegable and continuing duty of the defendant to exercise ordinary care to furnish the plaintiff a reasonably safe place in which to work.

"In this connection, the Court instructs the jury that if you find and believe from the evidence that on the 17th day of July, 1951, the plaintiff, while acting within the scope and course of his employment for the defendant, was engaged in burning weeds using a hand torch along the defendant's right-of-way, a short distance north of 'Garner Crossing' near the City of Garner, State of Arkansas, and that while so doing, if you do so find, plaintiff was **required to work** at a place in close proximity to defendant's railroad tracks whereon defendant operated its trains, and if you further find that on the occasion in question, while one of defendant's trains was passing the place where plaintiff was working, as aforesaid, it did cause fire from said burning weeds and smoke therefrom to come dangerously close to plaintiff and that plaintiff, in the exercise of ordinary care for his own safety, if you do so find, was required to retreat and move quickly away from said danger to the culvert mentioned in evidence and to use said culvert as his place of work, which said place was covered with loose and sloping gravel, if you so find, and which said place did not provide adequate or sufficient footing for plaintiff to thus move or stand under said circumstances; **and if you further find under all the facts aforesaid, if you find them to be the facts**, that the method of doing said work and the place of work thus provided by the defendant was unsafe and dangerous and not reasonably safe and that the defendant in thus adopting said method and if you do so find, and in providing said place of work, if you do so find, did fail to exercise

ordinary care and was guilty of negligence, and that as a direct and proximate result thereof, if you do so find, the plaintiff was caused to fall and to be injured thereby, then your verdict must be in favor of the plaintiff and against the defendant herein." (Emphasis supplied.)

From the foregoing quotations it will be observed that the petitioner alleged in his petition and submitted in his instructions the following elements of hazard:

(1) That petitioner was given a hand torch to use in burning the weeds;

(2) That he was required to work at a place in close proximity to defendant's railroad tracks;

(3) That trains were permitted to move and pass the point where petitioner was required to stand;

(4) That the passing of said trains would cause fire and smoke to come dangerously close to the petitioner;

(5) That a train did pass and did cause fire and smoke to endanger the petitioner;

(6) That said fire and smoke did cause petitioner to retreat and move quickly from the place where he was then working to a place that was covered with loose and sloping gravel;

(7) That the sloping gravel did not provide adequate and sufficient footing for petitioner to move or work under the circumstances,

Looking, then, to the pleadings, instructions and petitioner's brief, can it be said that petitioner is now basing his claim to relief on grounds other than those pleaded and submitted? Not at all! From the very moment this action was filed, petitioner has contended that a combination of dangers, created by respondent's negligence, caused

his injury. And the abundance of evidence, admitted at the trial upon the framework of the pleadings and used as a basis for the instruction of the trial court to the jury, amply demonstrated respondent's violation of its duty to petitioner to furnish him a reasonably safe place in which to work and a reasonably safe method of work. Among the evidentiary facts adduced at trial was petitioner's inexperience, which has merited comment in our brief. Petitioner's inexperience is an evidentiary factor, admissible under the pleadings, and forming part of the entire fact situation surrounding petitioner's injury. Clearly, however, petitioner has not, as respondent contends, bottomed his appeal solely on this factor.

**Respondent's Conduct Viewed as a Whole Warranted  
a Finding of Neglect.**

The same misunderstanding of the issues involved which leads respondent to isolate petitioner's comment on his lack of experience at the task required of him, and to label petitioner's argument, as "new contentions," also leads respondent to assume that its duty was fulfilled because the culvert might be said to be safe for normal use, and because the hand torch, in itself, was not dangerous. Respondent makes this assumption in framing the questions it believes presented to this Court.

Aside from the matter of petitioner's supposed "new contentions," discussed above, respondent's principal arguments, are:

- (1) the evidence showed that petitioner slipped on loose gravel on top of a drainage culvert on respondent's right-of-way, while attempting to walk across the culvert backwards, rapidly and with his arm over his eyes. This is not sufficient to raise a jury question as to whether petitioner was provided a reasonably safe place to work, when there was no evidence that



the top of the culvert was not entirely safe for normal and foreseeable use, and when there was no evidence that respondent had any knowledge as to the existence of the loose gravel.

(2) the evidence showed that respondent removed weeds from its right-of-way by spraying the weeds to kill them, and then having its section men burn the weeds, using a torch with a three foot handle. This evidence was insufficient to raise a jury question as to an unsafe method of work.

Respondent's position is patently erroneous. It has assumed that the culvert was the whole of petitioner's place of work; it has assumed that the torch was the whole of petitioner's method of work; it has confused the routine and ordinary use of the culvert and pathway with the particular use of it at the time of petitioner's injury; it has attempted to narrow the concept of foreseeability.

To isolate the culvert and the hand torch from the entire factual situation of which they were only parts is to miss the proverbial forest for the trees. At the time he was injured petitioner was not using the culvert in pursuance of routine or ordinary duties. He was using it only as a means of escape from the flames fanned toward and upon him by the speeding train. Respondent owed petitioner a "continuing" duty to use reasonable care in furnishing him a reasonably safe place in which to work and a reasonably safe method of work. The mere fact, therefore, that the culvert was reasonably safe for ordinary use and movements is foreign to the facts and the issues here. "That duty of the carrier is a 'continuing one' . . . from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent." *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 1. c. 353, 63 S. Ct. 1062, 87 L. Ed. 1444, 1. c. 1447.



The torch was simply the appliance used to light the weeds. Its handle was only three feet long. Of necessity it brought the petitioner in close proximity to the burning weeds at the time of their ignition. Thereafter, he was continuously exposed to the dangers of the fire because of the duties assigned to petitioner. These duties required him to stand on the west shoulder while respondent operated a train which fanned the flames toward and upon petitioner. The torch in and of itself might or might not be dangerous depending on its use, but it was part and parcel of respondent's method of work, which when all the elements are considered, was highly dangerous and unsafe.

At the risk of undue repetition, we herewith set out the facts showing the several elements which must be taken together in order to properly evaluate the whole. Petitioner was handed a crude, improvised hand torch (R. 9) and he was ordered by respondent to burn weeds which had been chemically prepared for the very purpose of making them ignite (R. 18). He was **required** to carry on this burning operation on the west shoulder (R. 10) in such close proximity to the tracks on which the trains were operated (R. 11, 12), that air disturbance from the trains would blow the fire toward the petitioner. In these circumstances, with the fire burning upon the shoulder, respondent operated its train upon the tracks at a speed of from 35 to 40 miles per hour (R. 34) so as to fan the flames toward the north and upon petitioner (R. 14, 16, 21). And, in addition to his duties with the fire, petitioner was **required** to watch the passing train for "hot boxes" from the west shoulder (R. 12), where he was compelled to stand by instructions of respondent (R. 13) and by the physical location of the fire (R. 28) and the prepared weeds (R. 18, 19). After petitioner had been watching for "hot boxes" for a scant two or three seconds (R. 34), the flames, fanned by respondent's train, overtook him (R. 14, 16, 21). With fire in his face, petitioner of necessity backed away quickly

onto the culvert where he was caused to fall and be injured seriously on the abnormal surface of the culvert, which did not provide a reasonably safe escape from the fire (R. 14, 15, 24, 34, 38).

“ . . . All these were facts and circumstances for the jury to weigh and appraise in determining whether respondent” in furnishing “that particular place in which to perform the task was negligent.” *Bailey v. Central Vermont R. Co.*, *supra*. Ever since this action was instituted, petitioner has contended that the entire situation, and the whole of respondent’s conduct therein, furnishes the measure of respondent’s liability. This principle is not a novel one. It was expounded by this Court, speaking through Mr. Justice Holmes, in *Union Pacific R. R. Co. v. Hadley* (1918), 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751:

“On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant’s conduct, viewed as a whole, warranted a finding of neglect. Upon that point there can be no question” (246 U. S. 330, 332).

Again, in *Blair v. Baltimore & Ohio R. Co.* (1945), 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, in words equally applicable to the case at bar, this Court stated:

“The negligence of the employer may be determined by viewing its conduct as a whole. . . . And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern,

SEP 15 1956

JOHN T. FEY, Clerk

# SUPREME COURT OF THE UNITED STATES.

No. 6 [REDACTED] 28

JAMES C. ROGERS,  
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,  
a Corporation,  
Respondent.

On Writ of Certiorari to the Supreme Court of the  
State of Missouri.

## BRIEF FOR RESPONDENT.

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# **SUPREME COURT OF THE UNITED STATES.**

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**No. 625.**

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**JAMES C. ROGERS,**  
Petitioner,

**vs.**

**MISSOURI PACIFIC RAILROAD COMPANY,**  
a Corporation,  
Respondent.

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**On Writ of Certiorari to the Supreme Court of the  
State of Missouri.**

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## **BRIEF FOR RESPONDENT.**

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### **QUESTIONS PRESENTED.**

Respondent submits that the questions presented for review are as follows:

(1) The evidence showed that petitioner slipped on loose ballast on top of a drainage culvert on respondent's right of way, while attempting to walk across the culvert backwards, rapidly, and with his arm over his eyes. Was such

evidence sufficient to raise a jury question as to whether petitioner was provided a reasonably safe place to work, when there was no evidence that the top of the culvert was not entirely safe for normal and foreseeable use, and when there was no evidence that respondent had any knowledge, actual or constructive, as to the existence of the loose gravel?

(2) The evidence showed that respondent, in order to remove weeds from its right of way, adopted a method of spraying the weeds to kill them, and then having its section men burn the weeds, using a torch with a three foot handle which enabled the section men to remain six feet away from the fire. Was this evidence sufficient to raise a jury question as to an unsafe method of work, when there was no evidence that there was any other method safer or better under the circumstances?

(3) Petitioner now virtually admits that the ruling of the Missouri Supreme Court that the evidence was insufficient to raise a jury question as to an unsafe place of work, or as to an unsafe method of work. May petitioner now be heard to complain of such ruling for reasons and grounds not pleaded or submitted to the jury?

### **STATEMENT OF THE CASE.**

The petitioner, James C. Rogers, brought this action under the Federal Employers' Liability Act (45 U. S. C. 51) to recover damages for injuries alleged to have been sustained by him on July 17, 1951, when, during the course of his employment, he was burning weeds on respondent's right of way near Garner, Arkansas, and, as he claims, fell on one of respondent's drainage culverts.

Petitioner alleged negligence of the respondent in providing an unsafe and dangerous place of work and in

adopting an unsafe and dangerous method of work (R. 2). Respondent denied all of the allegations of negligence (R. 3) and alleged petitioner's injuries, if any, were directly caused or contributed to by his own negligence (R. 4).

The evidence showed that respondent's right of way runs generally north and south (R. 7), at the place in question. Garner crossing, a public crossing, is the southerly most point involved. It crosses the right of way from east to west. The right of way consists of a "dump," on which gravel ballast is placed, then ties on the gravel and rails on the ties (R. 24). There are two sets of tracks, the one on the east for northbound trains and the one on the west for southbound trains (R. 7). The dump is wider than the area occupied by the tracks, ties and ballast, and extends from three feet to three and one-half feet out from the ballast (R. 8). The area from the ballast to the crest of the dump is called the shoulder. Petitioner claims to have been injured on the west side of the dump about two hundred fifty to three hundred yards north of Garner crossing at a drainage culvert (R. 38) on which he says he slipped and fell (R. 7). It was contended by petitioner that the shoulder of the dump was maintained and kept free from gravel for use as a path or walkway for section men to walk upon, but that this particular culvert was covered with gravel so that there was no flat level surface upon which petitioner could walk.

Respondent's evidence contradicted petitioner's contention that the shoulder was maintained for section men as a walkway or path, and further contradicted the contention that the top of the culvert was provided or maintained as a walkway (R. 51, 53, 58, 70, 73, 74, 87).

Petitioner, at the time of his injury, was "firing" or burning weeds on the west side of the right of way (R. 8,

11). In order to do so, he was given a torch made of a quart container with a spout on one side and a three-foot handle on the other (R. 9). The spout was stuffed with rags for a wick and the container filled with kerosene. The weeds had previously been sprayed with a weed killer and had withered and died. It was petitioner's duty to hold the lighted torch to the dead weeds, thereby burning them off.

The petitioner was twenty-seven years old at the time of trial, married with one child and living at McRae, Arkansas. He had lived all of his life in McRae, except for nine months in 1947 when he lived at Benton Harbor, Michigan. He was employed with the Missouri Pacific Railroad Company on May 21, 1951 (R. 35). On July 17, 1951, he, together with the other members of the section crew, reported for work at the customary time of 7:00 A. M. at McRae (R. 8). Petitioner testified that between McRae and Garner crossing they stopped to put in a few ties and arrived at Garner crossing about 10:30 A. M. (R. 8). They traveled on a motor car. When they got to Garner crossing, petitioner was given the hand torch by Mr. Howdershell, his foreman, and was told to burn the weeds on the right of way (R. 10). The rest of the crew went three hundred to four hundred yards north of the crossing to replace ties (R. 16). Petitioner was to burn weeds on the west side of the right of way to a path about two hundred yards north of the culvert (some four hundred to four hundred fifty yards north of the crossing) and then cross over to the east side of the right of way and burn the weeds back to the crossing (R. 11):

Petitioner testified that he had never done that work before, nor had he seen anyone attempt to fire weeds with a device such as the torch he was given. He said that normally a machine was used which spouted flame onto the right of way (R. 9). On cross-examination, he tes-



tified that the use of the flame throwing machine was something that took place long before he went to work on the railroad and that it was never used to his knowledge while he was there. He did not know anything about the operation of the flame throwing machine, nor of the duties of the section crew while it was in operation (R. 26, 27). His only knowledge of it was that, before he went to work for the railroad, he had stood and watched it pass along.

Petitioner said nothing to Mr. Howdershell when he was given the hand torch with which to burn the weeds. He did not inquire about using the flame throwing machine, nor did he tell Mr. Howdershell that he did not know how to burn the weeds with the torch which was given him (R. 17)

Petitioner burned weeds on the right of way north from Garner crossing for about thirty to forty-five minutes before he was injured (R. 10). He was getting along all right and had no trouble in his work (R. 17, 18). He was burning "just spots." He said that he had a flat dirt surface to walk on as he proceeded north (R. 9). He described it as a path about three feet wide between the ballast and the edge of the dump (R. 18). He testified that the foreman required the men to keep the shoulder free from gravel so that the men would have a place to walk (R. 33). As he walked north, he walked about two and one-half feet from the west edge of the ties (R. 9). He did not have to burn weeds to his right, but only to his left and he did not burn weeds all of the way down the dump, but only in spots for a distance of about two and one-half or three feet to his left (R. 19).

When he reached a point about thirty or thirty-five feet south of the culvert, he heard a train whistle for Garner crossing (R. 11). Normally, he said, the foreman would call coming trains in advance, but he had no notice of the



one approaching on this day (R. 15). On cross-examination, however, he admitted that he heard the train in plenty of time and that it caused him no surprise and that he had plenty of time after bearing it (R. 20). When he heard the train he "quit firing" and ran thirty to thirty-five yards north of his fire and stood about six or eight feet south of the culvert to watch the train for hot boxes (R. 13, 14). He said that the foreman had instructed the men that when a train went by the men were to stop what they were doing and watch the train for hot boxes (R. 12). On cross-examination, however, he testified that he had never been told to ignore a fire which he had set in order to watch a train for hot boxes, and that he had never thought the foreman meant that he was to do so, nor did he put any such construction on the foreman's previous orders that he was to do so (R. 29). He knew that it was his primary duty to watch and tend the fire (R. 30).

Petitioner knew that a wind follows a passing train, and he got ahead of his fire (R. 28). Because the train was on the far track from him (about fifteen or twenty feet) he did not think the wind would affect the fire too much (R. 29). At the time, he thought he was far enough away to clear himself from the fire or any danger from the fire (R. 14, 29). When petitioner got to a place six or eight feet south of the culvert, the engine of the train was just passing him (R. 14). He knew he was close to the culvert, he could see it, he knew it was there, and knew he was standing right next to it (R. 20, 21). He had worked near the culvert before (R. 39). It was no mystery to him, although he had not previously paid particular attention to it.

Petitioner describes his accident as follows (R. 14):

"At the time I thought I was far enough away, that I was plenty far enough to clear myself of the fire or

any danger of the fire and it was time to start to watch these journals. So I set my torch down on the end of the tie, and was standing out on the flat surface, watching the train go by. After the train had gotten approximately half or two-thirds of the way back, I felt this heat on my face, on the side of my face. I turned to see what had happened, and it was fire right up in my face. I threw my left arm over my face and started turning to the west, to the north, backing away rapidly from the fire, and that is when I walked in on this culvert and slipped and fell."

He walked backwards about three or four steps with his hand or arm over his face. He did not look to see where he was walking (R. 23, 24). Petitioner testified that culverts are numerous on railroads and that he has seen many of them. He said on direct and redirect examination that normally they have a flat surface upon which one can walk (R. 14, 32). On cross-examination, however (R. 25), he said that there was no path or flat surface across culverts such as is on the shoulder.\*

This particular culvert, petitioner testified, was covered with gravel. The gravel caused an incline on the top of the

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\* (R. 25) Q. You say the section gang keeps a path there for themselves to walk on? A. It is there, yes, sir.

Q. On both sides of the right of way? A. Yes, that's right.

Q. Every place on the railroad you have been? A. No, sir, not every place.

Q. Well, all along the right of way on that section you worked on? A. Yes; there is a flat surface of dirt other than where the culverts are.

Q. Other than where the culverts are? A. Yes.

Q. So any time you come to a culvert there isn't any. Is that right? A. There is not a dirt, flat surface.

Q. At any culvert? A. To a certain extent; I mean not like a shoulder is.

Q. That condition prevails throughout your entire section. A. Yes, sir.

and where each imparts character to the others" (323 U. S. 600, 604).

As to the culvert, which was but one element of the danger created by respondent's negligence, petitioner does not now and has never contended as respondent suggests, that respondent is obliged to construct drainage culverts up and down its line so that men could walk across them backwards, blindly and rapidly, without slipping and falling (Respondent's brief, page 15). Petitioner does maintain, however, that when respondent subjected the petitioner to the unusual hazards of fire by requiring him to stand in close and dangerous proximity to an oncoming train, which would and did cause the fire to spread rapidly, that then respondent owed the petitioner the non-delegable and continuing duty to provide a reasonably safe place in which to perform the tasks assigned to him. Otherwise respondent had no right to compel petitioner to stand on the west shoulder while performing the duty of watching the train for "hot boxes." And when it did so, the method and place of work became thereby unsafe and dangerous.

**The Duties Petitioner Was Required to Perform and the Circumstances Under Which He Was Required to Work Made Injury to Him Almost a Certainty. At Least, Such an Eventuality Was Clearly Foreseeable.**

Certainly there is no merit in respondent's claim that petitioner's injury was unforeseeable. The only reason respondent did not foresee or anticipate the likelihood of petitioner's injury is that it failed to give any consideration to petitioner's safety. Had the respondent given any thought to the matter,

- 1) It would not have required the petitioner to stand upon the west shoulder and to watch for "hot boxes" in close and dangerous proximity to the tracks upon which a train was then and there being operated in

such manner as to cause the flames to fan toward and upon the petitioner.

2) It would have provided him with adequate footing to contend with the dangers to which he was thus exposed.

Under the evidence, it is difficult to imagine how anyone could have escaped from injury and no crystal ball was needed to foresee the likelihood of such injury. "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Restatement of Torts, sec. 435 (1).

#### **Restatement of Petitioner's Contentions.**

Petitioner contends that the condition of the culvert under the circumstances increased petitioner's peril and contributed to his injury. In any event, respondent's failure to provide an adequate means of escape from the fire was only one of the elements of danger created by respondent. Even if the jury found that the culvert and walkway were literally perfect, and that petitioner would have been injured regardless thereof, it was still warranted in finding that respondent was negligent in creating the peril which caused petitioner to move and act as he did.

In discussing the method of work respondent simply attempts to justify the use of the hand torch instead of the flame-throwing machine. As we have pointed out before, petitioner is not contending that the use of the hand torch alone endangered his safety. Petitioner simply contends that the jury had a right to consider respondent's conduct as a whole—including every element of the danger—in determining whether or not respondent was negligent under the circumstances.



Petitioner has spelled out in detail the reasons why the method and place of work, in the light of the entire factual situation surrounding petitioner's injury, were unsafe and dangerous. The fact that respondent ignores them only makes them stand in bold relief.

This is not a case where the employee voluntarily selected his own place of work, as in *Frizzell v. Wabash R. Co.* (8 Cir., 1952), 199 F. 2d 153, cited by respondent. Nor was petitioner given the opportunity of calm and collected judgment. He was acting in an emergency attempting to escape from the ravages of fire and flames blown upon him by respondent's train. Likewise, these facts are radically different from those in *Wolfe v. Henwood* (8 Cir., 1947), 162 F. 2d 998, and *Gill v. Pennsylvania R. Co.* (3 Cir., 1953), 201 F. 2d 718, cited by respondent. In the *Wolfe* case, supra, the employee voluntarily without any order from his employer undertook to burn waste material while his clothing was saturated with inflammables. In the *Gill* case, supra, there was no emergency whatsoever and Gill was not required to move suddenly and quickly to avoid any hazard.

### CONCLUSION.

For the reasons given in petitioner's brief and in this reply brief, petitioner again respectfully submits that the judgment of the Supreme Court of Missouri should be reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1955

No. 625- 28

**JAMES C. ROGERS,**  
Petitioner,

vs.

**GUY A. THOMPSON, Trustee, MISSOURI PACIFIC  
RAILROAD COMPANY, a Corporation,**  
Respondent.

On Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Eighth Circuit.

**BRIEF FOR RESPONDENT IN OPPOSITION.**

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IN THE  
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OCTOBER TERM, 1955.

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vs.

**GUY A. THOMPSON, Trustee, MISSOURI PACIFIC  
RAILROAD COMPANY, a Corporation,**  
Respondent.

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On Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Eighth Circuit.

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**BRIEF FOR RESPONDENT IN OPPOSITION.**

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To the Honorable the Supreme Court of the United States  
of America:

Respondent respectfully requests this Honorable Court to  
deny the Petition for Writ of Certiorari to the Supreme  
Court of Missouri in the above case. In this behalf, Re-  
spondent shows the following:

**OPINION BELOW.**

The opinion of the Supreme Court of Missouri (App. A  
of Petition) is reported at 284 S. W. 2d 467.

## **JURISDICTION.**

The jurisdictional requisites are adequately set forth in the Petition.

## **QUESTIONS PRESENTED.**

1. Whether the decision of the Missouri Supreme Court, made in accordance with its duty to rule upon an issue of the sufficiency of the evidence in the case, should be reviewed by this Court, when the decision does not evidence an abuse of discretion or judgment.

2. Whether a railroad employee engaged in interstate commerce sufficiently raises a question of negligence for a jury to decide by mere proof of an accident brought about by his own voluntary actions and inattention to his assigned work.

## **STATUTES INVOLVED.**

The pertinent provisions of the Federal Employers' Liability Act (45 U. S. C., Sec. 51 et seq.) are set forth in the Petition at pp. 50-53 (App. G, H, I, J).

## **STATEMENT.**

This litigation involves an action for damages by a railroad section worker, engaged in interstate commerce, against his employer for injuries allegedly sustained in the course of his employment. In his pleadings (R. 2), Petitioner alleged negligence of the Respondent in failing to provide him with a safe place in which to work, and in failing to provide him with a safe method of work. Respondent denied the allegations of negligence and alleged contributory negligence as a cause of the accident (R. 5).

The alleged accident occurred on July 17, 1951, near Garner, Arkansas (R. 12). Petitioner was told by his foreman to burn weeds along the right of way while other mem-



bers of the section crew were to do some work three or four hundred yards north of Garner Crossing. Petitioner was to work north on the west side of the tracks from the crossing to where the other men were, and then work back to the crossing on the east side (R. 16, 28).

The vegetation was dead and dry, having been previously sprayed with a weed-killing chemical (R. 58, 60). Petitioner was given a torch consisting of a quart container filled with kerosene, with a spout on one side and a three-foot handle on the other. The spout was stuffed with waste for a wick (R. 14). He walked about two and a half feet from the tracks and burned weeds to his left only. He had no trouble and was burning "just spots" (R. 57).

Petitioner testified that he had not burned weeds in that manner before (R. 15). The only evidence as to any other method was that the Petitioner had seen a machine used, which spouted flame onto the right of way (R. 16), but it had not been used during his employment and he knew nothing about its operation other than that he saw it pass along, some time before he went to work for the railroad (R. 84, 85). The other testimony (uncontradicted) showed that the machine's use had been discontinued because it spread uncontrolled fire upon the ties, right of way and adjoining fences and property, requiring the section men to fight the spread of the fire (R. 300, 301). With the advent of modern chemicals the machine had been converted to spray weed killer and the dead weeds were then burned with less fire with the use of the hand torch. This was the usual method of removing excess vegetation from the right of way for some considerable time prior to Petitioner's accident, and the method being used by him at the time.

Petitioner worked north for thirty to forty-five minutes experiencing no difficulty (R. 16, 18, 57). He came to a



point thirty or thirty-five yards south of a drainage culvert when he heard a train whistle. The train was coming from the south. He testified that usually the foreman called the coming of trains, but he had not told Petitioner of this one (R. 26). Nevertheless, Petitioner testified that he heard the train coming in plenty of time to do what he wanted to do, and the fact that he was not previously told of it had no bearing on the later events (R. 61, 62).

Upon hearing the train whistle, Petitioner left the fire and trotted north to the culvert to watch the train for "hotboxes." He said that the foreman had given standing orders to the crew to watch all passing trains for hot-boxes (R. 20), but he did not construe the foreman's orders to mean that he should ignore his fire to watch the train, and he knew that tending the fire was his primary duty (R. 88, 89, 90).

From the time he heard the train whistle (some distance south of Garner Crossing) Petitioner never again looked at the fire which he was supposed to be tending. He knew that the passing train would cause some wind, but he did not think it would bother the fire too much (R. 88).

Having reached the culvert Petitioner stood watching the train until half or ~~two-thirds~~ of it was past him. He then felt heat on his face and turned and saw the fire close to him and smoke in his face. He threw his left arm over his eyes, and as he turned he walked backwards, rapidly, and in so doing walked onto the culvert and slipped on the gravel on the top of the culvert and fell, sustaining injuries (R. 23).

He knew the drainage culvert was there when he ran to it, he saw it when he ran to it, and knew that he was standing next to it; but when the smoke got into his eyes he forgot about it (R. 63, 67).

When Petitioner walked backwards onto the culvert he slipped on gravel which had been placed as ballast for the

ties (R. 67). He said that the ballast had slipped or shaken down so that there was an incline on the culvert instead of a flat, level surface such as he had been walking on, along the tracks.

The jury was instructed to find for Petitioner if they found his accident was proximately caused by defendant's negligence in that the place of work and method of work were unsafe.

The jury's verdict was for the plaintiff for Forty Thousand Dollars (R. 426).

Respondent's after-trial motions were overruled and, upon an appeal to the Supreme Court of Missouri, that Court reversed the case, because Petitioner had not offered sufficient evidence to show that the culvert was an unsafe place of work, or that the method of burning weeds was unsafe. The Court further held there was insufficient evidence to raise a question of fact as to whether the construction of the culvert was a proximate cause of the Petitioner's accident and injuries.

## ARGUMENT.

### I.

#### **There Is No Important Question of Federal Law or Conflict of Decisions.**

The Missouri Supreme Court had before it, in briefs and in oral arguments, all of the issues which Petitioner now seeks to raise by further hearing by this Court. The State court weighed the arguments, the evidence and the law applicable to such evidence. It unanimously held that, under the applicable federal decisions, the Petitioner did not submit sufficient evidence to raise a question of negligence on the part of the Respondent railroad.

Petitioner now seeks to have this Court review the considered opinion of the able judges of the Missouri court. In short, Petitioner is asking for Certiorari merely because this Court may possibly differ in its judgment of the facts.

As stated in **Brady v. Southern R. Co.**, 320 U. S. 473, 64 S. Ct. 232, 88 L. Ed. 239, there is no doubt but what this Court is charged with the duty of assuring litigants under this Act that they will receive similar treatment in all states. But by the same token, the **Brady** case holds that where, as here, a state's jury system requires the court to determine the sufficiency of evidence to support a finding, it is the duty of the appellate court, in accordance with the practice in the state, to enter judgment notwithstanding the verdict, or as was done in this case, to achieve the same result by reversal (320 U. S., 1. c. 479, 480, 88 L. Ed., 1. c. 242, 243).

We respectfully submit that whether this Court would approve or disapprove the State court decision is not so much an issue as whether it **should** review the opinion at

all. The case involves an accident which occurred in Arkansas. The Petitioner lived and worked there, as did all other witnesses in the case, save the medical experts who examined Petitioner for the purpose of testifying. The suit was brought in Missouri, which Petitioner had a right to do. Indeed, Petitioner could have chosen any one of several jurisdictions in which to bring his action. But when he so chooses a jurisdiction, does he not also choose to submit his case to the sound wisdom of the judges comprising the courts therein?

As above stated, there is no doubt that all cases arising under the Federal Employers' Liability Act must be decided in accordance with the federal decisions, regardless of where the action is brought. There is no doubt that the cases arising under the Federal Employers' Liability Act must be decided according to the law as expressed by this Court, and this Court must review cases, wherein variances from the federal decisions sometimes occur, in order to preserve uniformity in cases arising under the Act. But when Congress entrusted the handling of railroad employees' suits to State courts, did it not also entrust to the judges of the State courts at least such issues as the sufficiency of evidence? It is incumbent upon the trial and appellate judges of every jurisdiction to rule on the question of the sufficiency of evidence whenever the matter is properly raised. When a court then decides such an issue we submit that a review of its decision is entirely unwarranted, unless the decision constitutes an abuse of discretion and judgment, shocking to the conscience of this Court.

The principle could not be better expressed than it was by Mr. Justice Frankfurter in his noteworthy dissent in **Stone v. New York, C. & St. L. R. Co.**, 334 U. S. 407, 410, 97 L. Ed. 443, 445, wherein he said:

"Uniformity of direction in fitting the myriad diversity of circumstances to the applicable standards is

essential. It is a duty which ultimately belongs to this Court and one which it is fitted to discharge. To assess the unique circumstances of a case is quite a different matter. And for the decisive reason that right and wrong are not objectively ascertainable, that in fact there is no right and wrong when two equally competent and equally independent judges, equally devoid of any bias or possessed of the same bias, could by the same reasoning process reach opposite conclusions on the facts.

“ . . . Congress has seen fit to allow this action to be brought in the State courts and to forbid removal of a case to the federal court even when diversity of citizenship exists. (These cases in the State courts run into the thousands.) In thus entrusting the enforcement of the Federal Employers' Liability Act to the State courts it presupposed, as a generality, the competence of the judiciaries of the States, their professional capacity to enforce the Act and their self-critical fairness toward its purposes . . . Congress could hardly have assumed . . . that this Court must reverse the State judges merely because we and they differed, where difference was more than permissible, was inevitable, concerning whether or not a particular unique set of facts made out a case of negligence.”

When this matter was presented to the Supreme Court of Missouri it became incumbent upon the able judges of that court to determine whether the facts in the record raised a question of negligence. It was their duty to do so. While several recent decisions of this Court have urged greater latitude in allowing juries to decide even questionable cases of negligence, certainly there has been no mandate removing the power or the duty of the State court to decide, as a matter of law, whether the facts in a particular case were sufficient to submit to a jury. Here, the Missouri court has not strayed from the sound authorities of



the federal courts. Its conclusion was based on well-founded, recent federal cases. Its decision does not evidence a variance from any federal rule of law under the Federal Employers' Liability Act, nor is there a problem presented as to any conflict of federal decisions involved in this case. The Missouri court has given grave consideration to the applicability of the cases urged by counsel in support of their respective positions. Those cases which Petitioner now cites to this Court were before the Missouri court and considered by it. The decision is not without logic and judgment, but is based upon well-founded reasoning and the law as declared by this Court. We respectfully submit that review on the mere chance that this Court, upon again re-examining the facts in evidence, might not reach the same conclusion, even by the same reasoning process, is not warranted, and the writ should be denied.

## II.

### **The Decision Below Is Clearly Correct.**

There were but two acts of negligence charged against the Respondent by pleadings. The place of work and method of work were alleged to have been unsafe and the cause of Petitioner's injuries.

The place of work was alleged to be unsafe because the gravel ballast on top of the culvert, on which Petitioner slipped, had shaken and become loose and sloping instead of absolutely flat and smooth. The gravel was no doubt properly placed as ballast, according to Petitioner (R. 67), but he said that when he walked upon it backwards, blindly and rapidly, the gravel rolled under his foot causing him to fall. If Petitioner's view of the case is correct, every railroad in the United States would be required to maintain a walkway along every mile of its line, wide

enough and level enough and safe enough for every employee to walk along, backwards and with his arm over his eyes, even over drainage culverts which are intended to allow water to pass under the railroad right of way rather than to be used as walkways.

It is to be noted at the outset, as did the Supreme Court of Missouri (284 S. W. 2d, l. c. 472), that the condition of the drainage culvert was not shown by the evidence to have been unsafe for the ordinary use to which it could be expected to be put, including the duties, if any, which require workmen to walk across it. For all that is shown in the record, and Petitioner did not contend otherwise, any employee who was walking forward in a normal manner, looking where he was walking, could have walked across the culvert with absolute safety. At best, the evidence tends to show only that there was some danger in attempting to walk across the culvert in the manner Petitioner did at the time of his accident, without any evidence that it could reasonably be expected or anticipated that someone might attempt to do so.

The State court was manifestly correct in holding that foreseeability of an accident is a proper test of negligence and of proximate cause. In relying upon **Frizzell v. Wabash R. Co.**, 8 Cir., 199 F. 2d 153, the Court held (284 S. W. 2d, l. c. 472) that it cannot be logically said that a reasonable and prudent person could assume that loose gravel or crushed rock shifted down on the shoulder at the culvert by vibration of trains would subject section men to an unreasonable hazard, accustomed as they should be to moving over tracks, ties and ballast in their multiple duties. We submit that the State court's reasoning is sound especially where, as here, Petitioner was walking backwards, rapidly, with his arm over his eyes, at the time he slipped and fell (R. 23). Certainly, a reasonable and prudent employer could not anticipate such action and could

not conceivably provide any place of work safe for such manner of walking.

Petitioner relies heavily upon **Bailey v. Central Vermont R. Co.**, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, but the facts in the **Bailey** case are quite obviously different from those in the case at bar. There, the danger in the place of work existed **at all times** because of the nature of the construction of the place of work, and constituted a danger even when the place was used in the normal and expected manner. This is not our case. Here, there is no evidence that the place where Petitioner was required to work was not entirely suitable and safe for its ordinary, intended, and anticipated use. It was only when the Petitioner walked across the culvert backwards, blindly, and rapidly that he slipped and fell. In **Brady v. Southern Ry. Co.**, 320 U. S. 473, 64 S. Ct. 232, 88 L. Ed. 239, where the defendant had in use a rail which was worn and defective, but which was sufficient for the ordinary and intended use, this Court held there could be no liability on the defendant for the use of such rail even though if the rail had not been used plaintiff might not have been injured. The failure to provide against the bare possibility of an accident is not actionable and where the railroad's facilities are put to an extraordinary, unusual and unforeseeable test, there is no liability.

We believe Petitioner's claim that he was required to follow an unsafe method of work is wholly illusory because the method of firing the weeds (as distinguished from the fact that the weeds had been fired) had nothing to do with his injury. The Supreme Court of Missouri (284 S. W. 2d, l. c. 472) aptly disposed of this part of Petitioner's case as follows:

"Nor was there evidence tending to show that the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burn-

ing weeds. See and compare *Fore v. Southern Ry. Co.*, 4 Cir., 178 F. 2d 349. Of course, it could be asserted that fire itself is a hazard. But it is not contended that defendant was negligent in starting a fire. And the use of the hand torch in firing the weeds did not make the fire dangerous."

We might add that Petitioner did not allege (R. 2) and did not instruct (R. 419) on any supposed negligence in the fact of burning weeds, as distinguished from the method of burning them. We will, however, briefly discuss the evidence on this supposed issue.

The method of burning the weeds with a hand torch was the only method shown by the evidence to be available and practicable. As distinguished from the facts in *Stone v. New York, C. & St. L. R. Co.*, 334 U. S. 407, 97 L. Ed. 443, where the foreman had a choice of methods to perform the work, here the only practicable method of burning the weeds at the time of the accident was the method Petitioner used. Petitioner testified that a considerable time before he ever went to work for the railroad he had seen a weed-burning machine which spouted fire out on the right of way. The machine passed along as he stood some distance away watching it (R. 16). He had no knowledge of its operation or of the duties required of the section workers connected with its operation (R. 84, 85). The other testimony (R. 300, 301), which was entirely uncontradicted, came from the foreman, who was the only man in the section crew old enough to remember the use of the machine. He explained that the railroad did in fact use such a machine in years gone by, but it created considerable difficulty because it threw fire in great quantities onto the right of way, ties, and fences which spread into adjoining pastures. The section workers were then required to fight such uncontrolled fires, thereby being exposed to far greater dangers from fire than is evidenced in this case.



With the advent of modern chemicals, the use of the fire machine was discontinued and the machine was converted so that it sprayed weed killing chemicals. After the vegetation died the section workers then burned the weeds by using the hand torch. As Petitioner testified, this only required the men to burn weeds "in spots". Certainly this method cannot be said to constitute an unreasonable hazard.

Petitioner now claims, for the first time, that his "inexperience" was something that should have been taken into consideration by the foreman when he assigned Petitioner the task. In the case of **Fore v. Southern Ry. Co.**, 4 Cir., 178 F. 2d 349, where an employee of the railroad was injured in attempting to remove a nut with a wrench, and alleged negligence of the defendant because it was ordinarily done with an acetylene torch, the court held (l. c. 353) that it was a matter of common sense and ordinary experience that there was no reasonably foreseeable danger when a young man of considerable size and weight, in perfect health, is ordered to unscrew a small nut with the universally accepted tool for that purpose. By the same reasoning, we can hardly believe that a 24-year old man from a rural area of Arkansas (R. 8 and 9) would require experience in order to burn spots of weeds without incurring danger to himself, especially when he was provided with an appliance which kept him six feet away from the fire at all times.

Moreover, Petitioner had no difficulty with his work and was getting along all right until he left his fire and ignored it to watch the passing train for hotboxes (R. 16, 18, 57). He said he did so because of a previous general order given by the foreman to the crew to watch all trains for hotboxes. Yet Petitioner knew, by his own admission, that this general order did not mean he was to leave a fire unattended and unwatched in order to watch a passing train. He did



not construe the order to be an excuse to leave the fire. By his own testimony he knew it was his primary duty to tend the fire (R. 88, 89, 90).

True, the train which came by was not announced to Petitioner by the foreman, but by his own testimony the fact that it was not announced caused him no surprise. He had plenty of time after hearing the whistle to do what he intended to do, and he said that the lack of previous notice had no bearing on the later occurrences (R. 61, 62). Petitioner did not charge any negligence on the part of the foreman in failing to announce the train or in directing him to perform a task which he was incapable of doing (R. 2 et seq.).

The State court, therefore, correctly held that the facts did not present a question of negligence in providing an unsafe method of work. It could hardly be foreseen or anticipated by an employer, that, in using the hand torch to burn weeds, an employee (1) would ignore the fire which he had set in order to watch a train for hotboxes, although he knew it was his primary duty to watch and tend the fire, and (2) would, although he knew the train would fan the fire, simply misjudge how much effect the passing train would have on the fire, and (3) would place himself between an open and obvious culvert which he could see and knew was there, on one side, and the fire on the other, and (4) would continue to ignore the fire until it came close to him, and (5) would forget about the culvert and attempt to walk rapidly over it backwards with his arm over his eyes. An employer cannot reasonably be expected to anticipate and guard against every bizarre combination of circumstances which might produce an injury to an employee. Under the facts in this case, the Missouri Supreme Court could only follow the federal decisions in **Brady v. Southern Ry. Co.**, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239; **Fore v. Southern Ry. Co.**, 4 Cir., 178 F. 2d 349, supra, and **Chesa-**

**peake & Ohio R. Co. v. Burton**, 4 Cir., 217 F. 2d 471, which affirmatively establish the principle that under the Federal Employers' Liability Act, a place of work or method of doing work does not become unsafe by a voluntary action on the part of the employee who is injured.

### **CONCLUSION.**

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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culvert. He also testified that he slipped on gravel which had been properly placed as ballast.\*\*

All of the other members of the section crew were called to testify on behalf of Respondent. They stated that they had never seen a flame throwing machine used to burn the right of way since they had been working on the railroad. They had all been required from time to time to burn weeds and they said that the usual method was to burn weeds with a torch after the weeds had been killed by chemicals (R. 45, 59, 87). They also testified that they were familiar with the culvert on which petitioner claims he fell and that it was no different from any other culvert on their section or on the railroad (R. 49, 51, 54, 58, 69, 73, 87).

Mr. Leo Howdershell, the foreman, testified that he had been section foreman for twenty-five years and had worked for the railroad thirty years (R. 60). On the morning of July 17, 1951, he said he asked petitioner, whose back previously had been hurting him, how he was feeling, and petitioner replied that he was feeling pretty good (R. 62, 66, 67). Mr. Howdershell asked him if he felt like he could take the torch and burn the right of way where the weed sprayer had killed the weeds along the shoulder.

\*\* (R. 24) Q. When you slipped, you say the gravel slipped out from underneath you? A. Yes.

Q. This is that portion of the gravel that is right up next to the ties, isn't it? A. Yes, sir.

Q. There is gravel right up next to those ties everywhere along the railroad, isn't there? A. Yes, sir.

Q. That is the proper way, I believe, that a railroad is built so far as you know, isn't it? A. Yes.

Q. You have a dump and on top of that you put this gravel? A. Yes, sir.

Q. They call it "ballast," don't they? A. Yes.

Q. On top of that you lay the ties? A. Yes.

Q. And the rails. It was that ballast you were walking on at the time you slipped? A. Yes.

Q. It was that ballast that slipped from under your feet, wasn't it? A. Yes.

(R. 60). Petitioner said "Yes" he could do that. They stopped the motor car at Garner crossing and petitioner got off and started burning weeds. The rest of the crew went about a quarter of a mile north of the crossing, turned the motor car off and started replacing ties. About 10:00 or 10:30 A. M. petitioner came up to him and said that his back was hurting (R. 61).

At no time did petitioner tell the foreman anything about a culvert being involved and the foreman first heard about the culvert on the Sunday following the accident, when an attorney representing petitioner came to him to take a statement. The attorney told him that petitioner slipped and fell on the culvert (R. 64). Respondent's claim agent came to see the foreman on the 25th, and the distance from the culvert to the place where the torch had been found was measured with a tape (R. 65). It was hundred sixty feet north of the culvert (R. 66).

Mr. Howdershell, the foreman, said that he was familiar with the machine that had been used to burn the right of way and that it had not been used since 1949 or the early part of 1950. It was no longer used because it caused too much fire, sometimes burning adjoining property, pastures and woods. When it was used the section crew would have to follow along and put the fires out. If there was wind, the fire would spread onto the machine. The section crew had to fight the fires. After 1949 or 1950, the machine was converted into a sprayer to poison the weeds and kill them (R. 68, 69). After the weeds were killed they were burned off with a torch and it has been done that way ever since. He testified that they now have a lot less fires as a result of this method and it cuts down the amount of fire fighting (R. 69).

Mr. Howdershell said that the edge of the ballast is lined up straight. The crews try to maintain the ballast on a straight line (R. 75, 76). The only time they disturb

the rock, however, is when they dress it up after they have done a day's work at a particular place (R. 77). The shoulder is not maintained in particular, however, as a path or walkway (R. 73).

The case was submitted to the jury under instructions relating to whether or not the place of work provided by respondent was unsafe and dangerous, and whether or not the method of doing the work adopted by respondent was unsafe and dangerous (R. 93). The jury returned a verdict in the sum of \$40,000.00 (R. 97).

Respondent's after trial motions for judgment, in accordance with its prior motion for directed verdict, were overruled (R. 100). The respondent appealed to the Supreme Court of Missouri, which reversed the judgment (R. 101, 102), holding that petitioner had failed to show sufficient facts to raise a jury question as to an unsafe place of work, or an unsafe method of work, as being the proximate cause of petitioner's alleged injuries.



## SUMMARY OF ARGUMENT.

The respondent was charged with negligence in two respects, and in two respects only—in failing to provide a safe place to work, and in adopting an unsafe method of work. In so charging the respondent with these acts of negligence the petitioner assumed the burden of proving sufficient facts to raise a jury question as to the alleged acts of negligence.

As to the place of work, the evidence showed that petitioner was injured when he walked rapidly backwards with his arm over his eyes across a drainage culvert on respondent's right of way. He said he was caused to fall because of loose and sloping gravel on top of the culvert (R. 2). There was no evidence that the culvert was improperly constructed or maintained. It was not pleaded or proved that the respondent had actual or constructive knowledge of the loose and sloping gravel, which petitioner says was there because of train vibrations. Furthermore, there was no evidence that it could have been reasonably foreseen that an employee of the respondent, in using the top of the culvert as a walkway, would attempt to cross it while walking backwards rapidly and blindly, and it was not shown by the evidence that a person walking in a normal and expected manner could not have safely walked across the culvert.

As to the method of work, it was shown that the respondent sprayed the vegetation along its right of way with a chemical weed killer so that the weeds would die and, thereafter, caused the weeds to be burned with a hand torch. This required the weeds to be burned only in small patches or "in spots", as the petitioner testified (R. 18). There was no other method more safe or more suitable shown by the evidence. Petitioner claimed no dif-

ficulty because of the method employed at the time, but to the contrary was performing his work with ease until he saw fit to leave his fire and stand next to the open and obvious culvert which he knew was there, in order to watch a passing train for hot boxes. He did so with the knowledge that his primary duty was to watch and tend the fire, and by his own testimony he had never construed any previous orders of his foreman to mean that he should leave his fire to watch a train for hot boxes. He also knew that the passing train would fan the fire in his direction, but he simply misjudged how much effect the train would have on the fire. Thus petitioner has failed to prove a better or safer method of burning weeds from the right of way and he does not contend it was negligence to burn the weeds. He has further failed to prove that the method of burning the weeds was the proximate cause of his accident.

Petitioner on this appeal has argued to the Court several grounds which he states are sufficient for reversal of the decisions of the Supreme Court of Missouri. Petitioner argues that he was inexperienced, that he was given conflicting orders, and that because of his inexperience he was unable to judge the distance to put between himself and the fire (which it was his duty to tend) in order to watch a passing train for hot boxes. These contentions, if borne out by the evidence, may conceivably have individually or collectively constituted a cause of action against respondent. But petitioner did not rely upon these acts of negligence which he now argues to this Court, for he neither stated them in his petition, nor submitted them to the jury which heard the case. Thus he should not now be heard to argue to this Court that, on allegations of negligence other than those upon which the case was tried, he may have been able to produce sufficient evidence to support a jury verdict.

It is therefore inaccurate to say that the Supreme Court of Missouri "reweighed the evidence," as claimed by petitioner. Petitioner, as a matter of law, failed to sustain the burden of proving the allegations of his pleading and of his submission to the jury. The Supreme Court of Missouri did not reweigh the evidence but merely distinguished the evidence relating to that which was pleaded, from the arguments relating to subjects not pleaded. The State Supreme Court in so doing was manifestly correct.

## ARGUMENT.

Petitioner, as a matter of law, failed to sustain his burden of proving the Respondent negligent in furnishing him an unsafe or dangerous place of work and in adopting a dangerous or unsafe method of work, and now presents arguments relating to alleged acts of negligence not heretofore pleaded or made a part of the case.

### The Culvert.

It is to be noted that petitioner charged respondent with negligence in two respects: (1) In providing an unsafe and dangerous place of work, and (2) in adopting an unsafe and dangerous method of work. As to the place of work, there is no contention by petitioner that his place of work was at all unsafe until he got to the point where it was necessary for him to cross the drainage culvert upon which he claims he slipped and fell.

It is the evidence in regard to this culvert which must be examined to determine whether or not, as a matter of law, there was a question of fact raised for a jury to decide. Petitioner alleged (R. 2) and claimed by his testimony (R. 33) that the culvert was covered with loose and sloping gravel. It was this which he contends constituted the danger in his place of work.

It is to be noted in this connection that it was nowhere pleaded or contended in the evidence, nor does petitioner now claim on this appeal, that this culvert was improperly constructed or that the maintenance of it was improper. Similarly, petitioner has never claimed that the respondent had any notice, actual or constructive, of any dangerous condition relating to the culvert. To the contrary, it is only claimed that the ballast which was properly placed on top of the culvert had presumably, by train vibrations,

shaken loose. When this took place or how it happened is neither alleged or shown by the evidence. Thus petitioner does not claim that the respondent was remiss in any of its duties of inspection or maintenance through which the supposedly dangerous situation might have been discovered and corrected in the exercise of ordinary care.

By the same token, although it is pleaded that the culvert, being covered with loose and sloping gravel constituted a dangerous and unsafe condition in petitioner's place of work, still the evidence in the case goes no further than to show that petitioner slipped and fell because of the loose and sloping gravel, at a time when he was attempting to walk across the culvert rapidly, backwards and with his arm over his eyes. There is no evidence, and petitioner does not now contend, that a person walking normally, looking in the direction in which he was walking, even performing the duties of burning weeds on the right of way, could not have walked across the culvert with absolute safety to himself. In short, there is not one word of testimony that the petitioner, in normal circumstances, could not have walked across the culvert with absolute safety. To put it simply, petitioner claims negligence on the part of the respondent because the evidence showed respondent's drainage culvert was not so constructed that petitioner, on this particular occasion, could walk across it backwards, blindly and rapidly, without slipping and falling.

Common sense tells us that the test made of the culvert in this case was unusual, not expected and not at all foreseeable. Not only did petitioner walk across the culvert backwards and blindly with his arm over his eyes, but he had forgotten about the culvert and presumably didn't know he was going across one (R. 23).

Assuming that an obligation to provide a safe place to walk across each and every drainage culvert on a railroad



system does exist, we submit that such duty extends only to the use of such walkway across culverts as could be reasonably foreseeable and intended or anticipated—that is, that such walkways would be used in a normal manner by persons walking forward and at least looking where they were walking.

In the recent case of **Frizzell v. Wabash R. Co.** (1952), 8th Cir., 199 F. 2d 153, a section foreman claimed injury when he slipped on loose and sloping gravel while removing a push car from the railroad tracks. A motor car had been placed on the only motor car set-off nearby and there was no set-off on which the push car could have been placed. The section foreman's foot slipped in the ballast causing him injury. He claimed the defendant company was negligent in furnishing him with an unsafe place in which to work because the footing was insecure, and in failing to provide an additional motor car set-off on which to place the push car. The Eighth Circuit Court of Appeals held against the plaintiff on both issues. In regard to the unsafe place in which to work, the Court concluded that such an assignment of negligence assumed that it was the duty of the defendant, in the exercise of reasonable care, to keep the cinder ballasting on each side of the tracks and adjacent to the end of the ties smooth and even at all times and places, including the period of time when the ties were being removed and replaced. The Court said (199 Fed. 2d 157, 158):

*“ . . . can it be logically said that a reasonably careful and prudent person would assume that the normal indentations in cinder ballasting caused by normal rainfall would furnish a hazard to section hands accustomed, as they had to be, to walking along and over such ballasting? . . . We fail to find any reasonable grounds for the inference that defendant was negligent merely because slight unevenness in the surface of cinder ballasting was permitted to exist at*

such places as the location of plaintiff's injury."  
(Emphasis added.)

The **Frizzell** case, we submit, is precisely in point. At best, petitioner's testimony in this case can be taken to show only that the ballast had been shaken down and caused an unevenness or slope across the culvert. Even if it was, there is no evidence that petitioner or other section men could not walk across it in a normal manner. A reasonably prudent employer could only foresee that the culvert, if it was to be used as a walkway, would be used by a person walking across it in a normal manner. The record is void of evidence that it was ~~not~~ safe for such purposes.

In his brief petitioner now claims that respondent owed petitioner the duty of providing a safe escape route from his emergency situation, and the duty to provide a safe place in which to work regardless of how fleeting the circumstances may be. But even under fleeting circumstances a master is only bound to provide that which is foreseeable and the failure to provide against the bare possibility of an accident is not actionable. In **Brady v. Southern Railroad Company** (1943), 320 U. S. 473, 64 S. Ct. 232, 88 L. Ed. 239, this Court held that a railroad cannot be held to be negligent where an extraordinary, unusual and unforeseeable test is made of its facilities, and liability must arise from negligence, not from injury under this Act. Respondent certainly had no way of knowing, or anticipating, that petitioner would stand next to the culvert in order to watch the train. Petitioner was not told to do so. He simply ignored his duty to watch and tend his fire, and in so doing chose for himself the place he was to stand. Had he stood elsewhere, no doubt, the accident would never have happened.

Thus it is not necessary to reweigh the evidence, as petitioner claims was done by the Supreme Court of Missouri.

in order to reach the only logical conclusion regarding the place of work.

*"The basis of liability under the Federal Employers' Liability Act is negligence and . . . it is still the duty of the Court to determine whether the plaintiff has produced any evidence of negligence on the part of the defendant, and if not to direct a verdict."* **Eckenrode v. Pennsylvania Railroad Company** (1947), D. C., 71 F. Sup. 764 (l. c. 766), affirmed 3 Cir., 164 F. 2d 966, affirmed 335 U. S. 329, 69 Sup. Ct. 91, 93 L. Ed. 41.

Giving petitioner every benefit of every doubt, the place of work still was not proved to have been unsafe for any normal, intended or foreseeable use. It was only shown that petitioner slipped and fell while attempting to walk rapidly, blindly and backwards over the culvert, and that he slipped because of some loose gravel. Since petitioner did not allege, nor does he now contend that respondent had any notice, actual or constructive, regarding the supposedly dangerous condition, he cannot now be heard to contend that his evidence was sufficient, in a legal manner, to give rise to a question of fact for a jury to decide.

### **Method of Work.**

Respondent employed as its method of removing weeds from its railroad right of way the use of a chemical weed spray which caused the weeds to wither and die. Thereafter, as part of its method of removing the weeds from the right of way, respondent caused the dead weeds to be burned by one of its section men using a torch with a three-foot handle. In this instance the duty was assigned to petitioner. This was the sole method involved in this case. It was alleged that this method was dangerous and unsafe. The respondent denied this allegation. Contrary to the contentions made in petitioner's brief, the weeds were not "chemically prepared" so that they would "ignite

rapidly," except to the extent that they were simply dead weeds. It is a matter of common knowledge that it is most difficult to burn green growing vegetation.

There was no evidence of any other method more suitable or more safe. Petitioner attempted to inject into the case evidence that there was another method—that of the flame-throwing machine. It developed, however, by petitioner's own words that he knew nothing whatsoever about the use of such a machine, the section crew's duties, or any of the hazards relating thereto (R. 26, 27). On the other hand, the only witness competent to testify in regard to the use of the flame-throwing machine was the foreman, Mr. Howdershell. It had never been used during the term of employment of any of the section crew and they knew nothing about it. Mr. Howdershell, without contradiction, testified that the use of the machine was far more hazardous than the method of spraying the weeds and burning them off with a hand torch. He testified that the flame-throwing machine could not be controlled well. It would spread onto adjoining property and burn pastures, fences and the railroad ties. When there was wind the flame would be blown back on the machine, thus endangering the lives of the crew (R. 68). The machine was therefore converted to spray weed killer onto the right of way and the dead weeds thereafter were burned with a torch. By that method there was a lot less fire to contend with and the section workers had far less contact with the fire (R. 69). As petitioner himself testified, his job was only to burn weeds in small sections or "just spots" (R. 18). He would burn to his left only, a distance of about six feet from him, down the side of the dump, a distance of about two and one-half or three feet (R. 19).

Thus, we have a situation where the petitioner, by his own testimony, entirely disqualified himself as having any knowledge relating to the practicability of the only other method mentioned in evidence by which the vegetation



could be burned or removed from the right of way. The foreman, without contradiction, testified that the flame throwing method was far more hazardous and less desirable than the method employed at the time of petitioner's accident. Of course, the jury was not bound to believe the foreman's testimony. But disbelief of the foreman's testimony would not supply a want of proof, nor would the possibility alone that the jury might disbelieve the foreman's version make the case submissible. **Moore v. Chesapeake & Ohio Railway Co.** (1951), 340 U. S. 573, 578, 71 Sup. Ct. 428, 430, 95 L. Ed. 547, 550.

This is not a case, therefore, where the respondent's foreman had a choice of methods available to him and negligently adopted an unsafe method. The railroad is not obligated to adopt any particular means or method of performing the work so long as the method it does adopt is a reasonably safe one. **McGivern v. Northern Pac. Ry. Co.** (1942), 8 Cir., 132 F. 2d 213, 217; **Wolfe v. Henwood** (1947), 8 Cir., 162 F. 2d 998; **Brady v. Southern Railroad Company** (1943), 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239.

Moreover it is to be noted that the method of burning weeds caused petitioner no difficulty or danger. By his own statement he was not in the fire nor did he have a large amount of fire to watch. The difficulty was encountered when a train passed by, and respondent was not charged with negligence in running a train. When that happened he "quit firing" to watch the train for hot boxes, *yet he knew it was his primary duty to watch the fire* (R. 30). He said he did so because the foreman had instructed the crew to watch all passing trains for hot boxes, but at the same time he did not construe his foreman's orders to mean that he was to leave the fire which he had set in order to watch the train for hot boxes (R. 29).

He ran up to the culvert knowing the passing train would fan the fire in his direction (R. 28). He did not *think* the train would bother the fire very much (R. 29).



He *thought* he was far enough ahead of the fire (R. 14, 29). The record is void of any evidence that from the moment he heard the train whistle a quarter of a mile south of Garner crossing, when he "quit firing" and trotted some thirty-five or forty yards to the culvert (R. 19), that petitioner at any time looked back at his fire to see what was happening to it until he felt the heat on his face.

Again, it is not necessary to "reweigh the evidence." Taking petitioner's own testimony the question becomes: In spraying and burning vegetation along the right of way, could it be reasonably foreseen by respondent that an employee would, (1) ignore the fire to watch a train for hot boxes although he knew it was his primary duty to watch and tend the fire, and if so, (2) although he knew the passing train would fan the fire in the direction in which it was going, could it be reasonably foreseen that he would *assume* the train would not bother the fire much and *misjudge* the necessary distance to get ahead of the fire in order to ignore it and stand watching the passing train and, if so, (3) that he would place himself between an open and obvious culvert which he could see and knew was there on one side and the unwatched, unattended fire on the other, and, if so, (4) that he would continue to ignore the fire while one-half or two-thirds of the train went by, until the fire came dangerously close to him, and, if so, (5) that he would forget about the culvert which he had seen and which he knew was there and attempt to walk rapidly over it, backwards, with his arm over his eyes, to escape the fire and smoke? We respectfully submit that it takes a long stretch of imagination to believe that a reasonable and prudent employer would or should, in the exercise of ordinary care, anticipate such a bizarre coincidence of circumstances.

For all that is shown, had the petitioner let the train go by and continued to tend the fire, *which he knew was his pri-*

man's duty (R. 30), the accident would never have happened. There is nothing in the record to the contrary and petitioner did not make any statement that would lead one to believe that he would have been in any danger had he continued to watch the fire. This is not mere argument, for petitioner said that he did not construe the foreman's orders to watch trains for hot boxes to mean that he should ignore the fire which he had set (R. 29).

In the case of **Fore v. Southern Railway Company** (1949), 4th Cir., 178 F. 2d 349, where an employee of the railroad was injured in attempting to remove a nut with a wrench, and alleged negligence of defendant because ordinarily it was done with an acetylene torch, the Court held (l. c. 353):

"Here Fore offered no evidence whatever even to prove any element of foreseeable danger in carrying out the order in question. Surely it would seem a matter of common sense and ordinary experience that there was no reasonably foreseeable danger when (under the facts of this case) a young giant, 6 feet 5 inches tall, weighing 235 pounds, in perfect health, is ordered to unscrew a small nut, easily within his reach with a wrench, which is the almost universally accepted tool for that purpose."

The **Fore** case is most frequently cited for the legal proposition that "an injury which was not foreseen, and could not be reasonably anticipated as the probable result of an act of imputed negligence, is not actionable" (178 F. 2d 349, 353). Certainly it is a matter of common sense and ordinary experience that the plaintiff, a man 25 years of age at the time of the injury, should have been able to properly tend a small grass fire without incurring danger to himself, especially when he was provided with an appliance which kept him away from the fire at all times.

In **Wolfe v. Henwood** (1947), 8th Cir., 162 F. 2d 998, another case arising under the Federal Employers' Liability Act, the plaintiff was required in the course of his duties to bail out an accumulation of fuel oil and water from a concrete catch basin, and in so doing his clothes became saturated with the fuel oil. Later, there being no cleansing facilities available, plaintiff used gasoline to remove the fuel oil from his clothes, and in seeking to destroy the waste with which he had applied the gasoline to his clothes, he set fire to it. When he did so the flame set fire to his glove, and he slapped the side of his leg, setting fire to his clothes and sustaining severe burns which caused his death. In holding that there was no negligence because the accident was one which could not reasonably have been foreseen, the Court said (l. c. 1000):

"We fail to perceive a basis for a finding of negligence in failing to furnish a pump to remove the oil and water from the pits. The evidence goes no farther than to establish that it would have been as practical to remove the oil by mechanical device as it was to remove it by dipping. It was, of course, within the realm of the possible that an accident would occur during the process of removing the oil, regardless of method used, but there was no evidence that this chance was unduly enhanced by the method used. Defendant had a choice of methods, neither one of which was inherently dangerous and cannot be charged with lack of due care in the choice made."

Similarly, in the case at bar, the evidence goes no farther than to establish that the burning of the weeds at one time was done by the use of a flame throwing machine, but there is no evidence supporting, and plaintiff's own testimony refutes, his contention that the chance of injury was enhanced by the method of burning the weeds with a hand torch.

A case close in principle to the one at bar is that of **Gill v. Pennsylvania Railroad Company** (1953), 3rd Cir., 201 F. 2d 718, cert. denied 346 U. S. 816, 74 S. Ct. 27, where it was alleged that the defendant railroad was negligent in directing plaintiff, whose knee injury was known to the defendant, to work under a rack which was so low that it required plaintiff to hold his injured knee in an awkward position. When he backed out from under the racks and stood up he thought he was clear of the racks but struck his head, and was injured. Plaintiff testified that he had never worked in a boxcar with racks in it before. In holding that the plaintiff had made no case, the Court said (l. c. 721):

“The crux of plaintiff’s argument seems to be that the negligence of the defendant in sending the plaintiff to the car caused the accident, because he would not have misjudged the distance if he had not been there. But that does not constitute legal proximate cause. To the contrary, it is almost a hornbook illustration of no proximate causation.”

Almost precisely the same thing happened here. The plaintiff was getting along perfectly all right until he stopped tending the fire to watch a train go by. He knew that there would be some wind following the train (R. 28). He did not *think* it would bother the fire too much and *thought* he was far enough away from the fire so that he could ignore it (R. 14, 29). In other words, he simply *misjudged* the effect of the wind caused by the train on the fire—he knew there would be some—and misjudged the distance to put between himself and the fire. Certainly, it cannot be said that the hand torch method of firing the right of way was the proximate cause of plaintiff’s error in judgment and lack of attention to his work.

Furthermore, petitioner presumably could have stood any place else on the right of way with absolute safety



to himself *even if he had chosen to ignore his fire*. Certainly the method of burning the weeds cannot be said to give rise to a duty to anticipate that petitioner might voluntarily stand between the fire and the culvert, instead of on the other side of the culvert, or elsewhere on the right of way. It has been held many times that the Federal Employers' Liability Act does not make a railroad company an insurer against personal injuries to its employees. Before the employee may recover he must prove that the railroad's negligence was the proximate cause of his injury. **Chesapeake & Ohio R. Co. v. Thomas** (1952), 4th Cir., 198 F. 2d 783, 788, cert. den., 344 U. S. 921, 73 S. Ct. 387, 97 L. Ed. 709. There must be more than a scintilla of evidence which tends to show negligence on the part of the railroad. **Fore v. Southern Ry. Co.** (1949), 4th Cir., 178 F. 2d 349; **Brady v. Southern Ry. Co.**, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239. It has also been held that a place of work or method of doing business does not become unsafe by a voluntary action on the part of the employee who is injured. **Chesapeake & Ohio R. Co. v. Burton** (1954), 4th Cir., 217 F. 2d 471. See also **Atlantic Coast Lines R. Co. v. Coleman** (1950), 182 F. 2d 712.

We respectfully submit that there was no foreseeable danger to the petitioner in asking him to burn small patches of grass on the right of way with a hand torch. The hand torch itself caused plaintiff no injury. The use of it in no way harmed him. The case involves the simple matter of an employee who failed to pay proper attention to the duties to which he was assigned and, under the cases cited above, the method employed was not the proximate cause of petitioner's injury. We respectfully submit that on the facts of the case at bar, and on the law cited herein, no submissible case was made.



### Petitioner's New Contentions.

Petitioner now virtually concedes at pages 20, 21 and 27 of his brief, that the Supreme Court of Missouri correctly held the place of work and the method of work were not proved to be unsafe or dangerous. Petitioner says, at page 21 of his brief:

"These *truisms* take on a different meaning, however, when we consider the manner in which they were being used at the time of petitioner's injury. For illustration, a cow is a docile animal; an oil lantern is a simple appliance; barns are common place structures; but we learned through Mrs. O'Leary that they cannot be used successfully in close and dangerous proximity to each other." (Emphasis ours.)

It may be that had respondent tied the hand torch to the tail of Mrs. O'Leary's cow and set it to burning the weeds it would have been foreseeable that the cow would get itself into trouble. But respondent did not employ dumb animals to burn weeds on its right of way. It employed a twenty-five year old man, presumably of reasonable and ordinary intelligence. Furthermore, petitioner did not plead or submit to the jury that he was in any wise incapable of performing a simple task with a simple apparatus such as the hand torch.

At page 3 of his brief, petitioner again claims that one of the issues in the case relates to petitioner's lack of experience in firing weeds along the right of way and his ignorance as to the method employed at the time of performing the work. It may be that petitioner had no previous experience and had not seen the right of way burned in the manner or method assigned to him. But petitioner did not allege this to be an act of negligence on the part of respondent nor was this issue submitted in petitioner's verdict directing instruction. Yet it is petitioner's only justification for contending now that there was a jury issue in

this case, notwithstanding the fact that for the usual and intended purposes and circumstances, the place of work and method of work were, by the evidence, indisputably shown to have been reasonably safe. Compare the pleadings in **Atlantic Coast Line R. Co. v. Coleman** (1950), 5th Cir., 182 F.2d 712.

At page 16 of his brief, petitioner says that "respondent created an emergency situation by compelling the petitioner to watch for hot boxes at a time when it was highly dangerous for him to do so. It was the imposition of these concurrent and conflicting duties that made the respondent's method of work an unsafe and dangerous one." There are two answers to this argument. First, it is contradicted by petitioner's own testimony. He testified that he knew his primary duty was to watch and tend the fire (R. 30) and that he did not construe his foreman's previous orders to mean that he should ignore his fire in order to watch for hot boxes (R. 30). In the second place, petitioner did not allege in his pleading that the method of doing the work was unsafe because of conflicting orders, nor did he submit this question to the jury. In short, the petitioner has never, until this appeal, contended that there was any negligence on the part of respondent in giving supposedly conflicting orders which created a dangerous situation to him.

The respondent was never charged with negligence in setting the fire and petitioner does not so contend at this time. Respondent is not charged with negligence in operating a train past where petitioner was required to work and petitioner does not so contend at this time. If petitioner were too inexperienced to competently perform the work, it should have been alleged in his pleading and submitted in his instructions. If petitioner were inexperienced and unable to distinguish between his duties to watch and attend the fire which he had set and the previous order of the foreman to watch passing trains for hot boxes, it

should have been pleaded and submitted to the jury. If petitioner were so inexperienced that he could not safely judge the distance to put between himself and the fire which he had set, it should have been pleaded and submitted to the jury. These are the elements upon which petitioner now contends he made a case for the jury. But these were not the elements upon which the respondent was sued or upon which the case was submitted to the jury.

It is elementary in our system of law that one who is sued has a right to know the charges upon which he is being sued, and to be held liable only upon those charges and not upon any others. If respondent was to be charged with negligence in creating an emergency, giving conflicting orders, assigning an inexperienced employee to perform a task which he was incompetent to perform safely to himself, these issues should have been pleaded and submitted. They were not, and petitioner's arguments to this Court on these issues should be rejected.

Wherefore, we respectfully submit that under the pleadings, the evidence and the instructions to the jury, the Supreme Court of Missouri correctly held petitioner failed to make a submissible case.

### **CONCLUSION.**

It is respectfully submitted that the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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**MOTION FILED MAR 22 1957**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1956**

**No. 28**

**JAMES C. ROGERS,**

*Petitioner,*

*v.*

**MISSOURI PACIFIC RAILROAD COMPANY,**

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF MISSOURI, DECIDED BY THIS COURT ON THE  
MERITS ON FEBRUARY 25, 1957.

**MOTION FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE IN SUPPORT OF RESPONDENT'S PETI-  
TION FOR REHEARING**

**AND**

**BRIEF OF THE ASSOCIATION OF AMERICAN RAIL-  
ROADS AS AMICUS CURIAE IN SUPPORT OF SAID  
PETITION FOR REHEARING, TO BE CONSIDERED  
IN CASE SAID MOTION FOR LEAVE TO FILE BE  
GRANTED.**

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Brief of The Association of American Railroads as *amicus curiae* in support of said petition for rehearing.

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### I. INTEREST OF *AMICUS CURIAE*

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### II. ARGUMENT

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Point I. Case No. 46, *Herdman v. Pennsylvania Railroad Co.*, decided on the same day as this case, read alone, seems to apply the correct rules of the substantive law of negligence applicable to cases of this character under the FELA, but it fails to distinguish itself from this case, No. 28, and from two other cognate cases, Nos. 42 and 59, decided the same day, and the said four cases, grouped together for purposes of dissent in the four cases and of concurrence in No. 46 and dissent in Nos. 28, 42 and 59, and the result of their divergent opinions leave the controlling law in a state of unfortunate confusion.

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Point II. The opinion of this Court in the instant case, No. 28, however, not only does not clarify the law, it further confuses it. It should be modified to bring it into harmony with fundamental principles of the law of negligence and causation.

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Point III. This Court's decision on the same day in No. 42, *Webb v. Illinois Central Railroad Co.*, will be read together with its decision in this case, No. 28, and, so read, it tells the bench, the bar and the public that



juries must be allowed to base verdicts in these FELA cases on speculation and conjecture. The opinions in this case and in No. 42 should be revised so as to eliminate that holding

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Point IV. We submit that the course of this Court's FELA decisions since *Brady v. Southern Railway Co.*, 320 U. S. 475 (1943) has undermined all the "smallest part" of the law of negligence left in the statute by Congress and that that course should be checked now, at this Term, so as at least to leave in life the principles (1) that jury verdicts in these cases may not be supported upon a mere scintilla of evidence, and (2) that juries may not be allowed to base verdicts for plaintiffs in these cases on pure speculation and conjecture, either as to railroad negligence or as to causal relation between such negligence and the injury to or death of an employee

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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1956

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No. 28

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JAMES C. ROGERS,

*Petitioner,*

*v.*

MISSOURI PACIFIC RAILROAD COMPANY,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF MISSOURI, DECIDED BY THIS COURT ON THE  
MERITS ON FEBRUARY 25, 1957.

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE IN SUPPORT OF RESPONDENT'S PETI-  
TION FOR REHEARING.**

The Association of American Railroads (AAR) hereby respectfully moves the Court for leave to file a brief *amicus curiae* in this case in support of respondent's petition for rehearing. The consent of counsel for the respondent has been obtained. The consent of counsel for the petitioner has been requested but refused. Hence this petition is filed under Rule 42 (2) and (3). Since our time and respondent's time run concurrently, expiring on Friday, March 22, 1957, four days after our employment in this matter, this motion and the subjoined brief have had to be prepared without

our having had the benefit of seeing respondent's Petition for Rehearing, which we are informed it intends to file.

The movant, The Association of American Railroads, hereafter referred to as "AAR," is a voluntary, unincorporated, non-profit organization composed of member railroad companies operating in the United States, Canada and Mexico. Full membership is open to all Class I railroads as now classified by the Interstate Commerce Commission, that is, all having gross annual operating revenues of three million dollars or more, and there is provision for associate membership by railroads and terminal and switching companies having less than that amount of gross annual operating revenues, all of which latter are now classified as Class II railroads.

There are at present 187 full members and 164 associate members of AAR. The Class I member railroads operate over 99 per cent. of the total railroad mileage of Class I railroads in the United States and have gross operating revenues of over 99 per cent. of the total Class I operating revenues in this country. The activities of AAR cover a wide range having to do with such matters as research, operation, car service, traffic, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

AAR, as the joint representative and agent of these member and associate member railroads, has a vital interest in the developments of the law of the Federal Employers' Liability Act, 45 U.S.C. 51-60 (1952 ed.) — hereinafter called "FELA" — and in the changing interpretations of that substantive law in the decisions of this Court in the last sixteen years. That interest is different from, and broader than, the interest of a particular member



railroad in a particular case it may have before this Court under the Act, since the particular litigant is immersed in the facts in evidence, pleadings, and particular contentions, arguments and holdings of courts below in its particular case, often to the exclusion, to some extent, of a broad view of the developments of the general and fundamental principles of the substantive law under the Act.

AAR is informed, believes and, therefore, alleges that respondent in this case will make timely filing of a petition for rehearing in which it will pray this Court to reconsider the facts in evidence herein as well as to reconsider and modify its opinion and judgment herein of February 25, 1957. AAR, if this motion for leave to file brief *amicus curiae* in support of respondent's said petition for rehearing be granted, does not intend to ask or urge this Court to give a still further reappraisal of the facts in evidence herein, or of particularities of pleadings, motions, contentions, or other technical matters. We will confine our presentation to consideration of the Court's opinion and judgment herein and to pointing out important respects in which it is not in harmony with other pertinent decisions of this Court and serves to leave the substantive law of the FELA, not in a state of greater clarity and certainty, but in a state of even greater confusion, than heretofore, so that state trial and appellate courts and federal district and circuit judges, and the bar of this country, will have more difficulty than ever before in educing from this Court's decisions a coherent pattern of controlling principles of the law of negligence as applicable in cases arising under the FELA. In speaking of such cases, we mean, of course, cases such as this one, involving simple, common-law concepts of negligence and causation, unaffected by any allegations of violation by the railroad-defendant of any of the safety appliance statutes of Con-

gress, violation of which imposes upon the violator an absolute legal liability for damages, regardless of fault. These reasons lead us to believe that important questions of law which we intend to present and which we shall submit are highly relevant to final disposition of this case, will not be so adequately presented by the parties as we may present them if this motion be granted.

AAR further has a vital interest in the ever-larger amounts of operating revenues which its members have to disburse annually in satisfaction of claims and suits under the FELA, amounts totalling many millions of dollars annually, amounts which have more than doubled and trebled in the past fifteen or sixteen years, in large part by reason of the changing principles applied by this Court in the course of its decisions under the FELA. For example, the most recently available statistics show that for the period April 1, 1955, to December 31, 1955, its Class I member railroads paid out for employee injuries and fatalities alone, not including payments to passengers, crossing-accident claimants, trespassers or other non-employees, in suits under the FELA \$22,164,140, and in settlements of claims under that Act \$4,114,441, or a total of \$26,278,441. For the full year 1956, the same members paid out in such suits \$28,328,285 and in settlement of such claims \$4,626,378, or a total of \$32,954,663.

The grand totals for the same Class I member railroads for the full period of four years and four months, from September 1, 1952 through December 31, 1956, were as follows:

Number of suits — 7,106	
Amounts of settlements of suits	\$ 99,470,153
Claims settled — 2,908	
Amount of claims settlements	\$ 24,420,944
Aggregate payments	\$123,891,097

No such statistics were kept prior to September 1, 1952 and AAR had no department keeping such statistics prior to that date. It should be observed that all of the above figures include only claims and suits settled by the railroads with attorneys for claimants. In other words, no claims settled directly with claimants who did not have lawyers are included, and there were a great many of these of which we have no records.

And it must be remembered that the public ultimately must bear such enormous burdens on operating revenues and that they are at much higher rates for the public-servant railroads than for privately operated profit industries which are, by and large, covered by Workmen's Compensation Acts, which impose liability without fault but, in compensation for granting to injured employees and imposing upon employers such substantive, automatic liability, strictly limit recoveries to carefully established amounts graduated according to the nature of the injury.

Wherefore, your movant respectfully prays that this motion be granted and presents and files its separate brief *amicus curiae*, bound in the same pamphlet with this motion, upon which it will rely if the present motion be granted. This we understand to be the proper practice under revised Rule 42, see Stern and Gressman, *Supreme Court Practice — Second Edition — Revised Rules*, pp. 316-317.

Respectfully submitted,

SIDNEY S. ALDERMAN,

*Counsel for the movant, The  
Association of American Railroads.*

Of Counsel:

FRANCIS M. SHEA,

SHEA, GREENMAN, GARDNER & MCCONNAUGHEY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 28

JAMES C. ROGERS,

v.

*Petitioner,*

MISSOURI PACIFIC RAILROAD COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF MISSOURI, DECIDED BY THIS COURT ON THE  
MERITS ON FEBRUARY 25, 1957.

**BRIEF OF THE ASSOCIATION OF AMERICAN RAIL-  
ROADS AS AMICUS CURIAE IN SUPPORT OF RE-  
SPONDENT'S PETITION FOR REHEARING.**

I

**INTEREST OF AMICUS CURIAE**

A concise statement of the interest of The Association of American Railroads—hereinafter called "AAR"—is set out in the preceding motion for leave to file this brief, as required by Rule 42(3). Instead of repeating that statement here, we believe it to be the better practice to, and we do, refer to that statement and ask that it be considered as incorporated here by reference and as proper compliance



with Rule 42 (5) requiring that a brief *amicus curiae* "set forth the interest of the *amicus curiae*, \* \* \*."

We do not undertake to make a Statement of the Case but fully adopt the statement to be made by respondent in its petition for rehearing. There is no question of jurisdiction. This Court has taken jurisdiction and exercised it on the merits. We do not deem it to be proper for a "friend of the Court" to undertake to tell this Court about the details of a case with which the Court was already thoroughly familiar long before this "friend" became acquainted with the case at all.

We do here merely point out, as already suggested in the foregoing motion, that this case involves no allegation or contention that the respondent railroad violated any federal, statutory safety appliance requirement, a violation of which would impose upon the violator an absolute liability as a matter of law for damages to any employee injured as a result of such violation. We have in this case, therefore, only the simple and familiar common-law concepts of negligence and causation on the question of liability *vel non* and the customary questions as to the respective functions of juries, trial courts and appellate courts in such uncomplicated cases under the FELA. But we do have conflict between this Court's opinion and judgment in this case and its well-considered opinions and judgments in other comparable and recent cases, as we shall undertake to demonstrate.

## II

### ARGUMENT

#### POINT I

Case No. 46, *Herdman v. Pennsylvania Railroad Co.*, decided on the same day as this case, read alone, seems to apply the correct rules of the substantive law of negli-



gence applicable to cases of this character under the FELA, but it fails to distinguish itself from this case, No. 28, and from two other cognate cases, Nos. 42 and 59, decided the same day, and the said four cases, grouped together for purposes of dissent in the four cases and of concurrence in No. 46 and dissent in Nos. 28, 42 and 59, and the result of their divergent opinions leave the controlling law in a state of unfortunate confusion.

We do not see how the Court could have reached any other result than that which it reached in No. 46, *Herdman*. Railroads are required to have their locomotives equipped with efficient air-brakes making possible emergency applications of brakes. Pennsylvania's freight locomotive engineer made such an emergency application in a dire emergency, to prevent striking an automobile, containing innocent people, including school children, with an inevitably resulting sudden stop, which threw down and injured the conductor in the caboose at the end of the train. Pennsylvania was fortunate in having as its employee-conductor and plaintiff in the suit against it a man of extraordinary frankness and candor as a witness in his own behalf. He testified as to the above facts and as to his fall and injury. He did not testify, as a plaintiff often would do, that the stop was made with any special or unusual severity. He did not claim that such unscheduled and sudden stops of trains are unusual or extraordinary occurrences. He was honest enough to testify: "We got to expect them or think about them." The Court of Appeals for the Sixth Circuit agreed with the District Court that there was a complete absence of probative facts to support a conclusion of railroad negligence. This Court granted certiorari to determine whether the petitioner was erroneously deprived of a jury determination of his case. It held that he was not so erroneously deprived and affirmed the judgment of the

Court of Appeals. Mr. Justice Frankfurter dissented from the granting of certiorari. Mr. Justice Harlan concurred in this Court's decision.

If we can read that opinion and decision rightly, it contains implicitly and gives effect to the following fundamental principles, which we think should be declared explicitly and reaffirmed in clear terms, substantially as they were declared in *Brady v. Southern Railway*, 320 U.S. 476 (1943):

1. The FELA does not impose upon railroads liability without fault;

2. It does not make railroads insurers of the safety of their employees;

3. It does not impose upon them liability based merely upon the fact of injury to an employee while within the scope of his employment;

4. It is still a negligence statute and the burden is upon the plaintiff to adduce evidence of probative facts sufficient to support a reasonable conclusion of railroad negligence from which the injury or death resulted "in whole or in part," in the absence of which proof it is the duty of the trial court to take the case from the jury, either by directed verdict for the defendant, or by judgment for defendant *n.o.v.*, or by setting aside the verdict if it has been rendered, and it is likewise the duty of the appellate court to reverse the trial court if it fails to do so.

As Mr. Justice Harlan well said in his opinion concurring in No. 46 and dissenting in Nos. 28, 42 and 59, "No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. The problem has always been one of judgment, to be applied in view of the purposes of the statute. It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a *reasonable* man to infer both negligence and causation by *rea-*

soning from the evidence. *Moore v. Chesapeake & O.R. Co.*, 340 U. S. 573. And it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifted that duty from the courts." (The italics for emphasis are Mr. Justice Harlan's.)

That the Seventh Amendment did not lift that duty from the courts is the clear teaching of the opinion of Mr. Justice Rutledge for this Court in *Galloway v. United States*, 319 U. S. 372 (1943). At page 395 of its opinion in that case, this Court dealt with "standards of proof" our courts have traditionally required for submission of evidence to the jury. It said that the matter is not greatly aided by substituting one formula for another and concluded, in words highly relevant to the present case:

"\* \* \* Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."  
\* \* \*

The whole paragraph ended with the statement, "If there is abuse in this respect, the obvious remedy is by correction on appellate review." And those quotations are from a lengthy and carefully reasoned opinion in which this Court had before it, throughout, the question as to the effect and application, if any, of the Seventh Amendment on this very matter of courts taking cases from juries.

Since the Seventh Amendment, the act of the sovereign people, did not, as Mr. Justice Harlan says, and as this Court held in *Galloway*, lift that duty from the courts, it

seems plain that the FELA *a fortiori* did not and could not have such effect.

It further seems plain that that is the necessary effect of this Court's decision in No. 46, *Herdman*, decided the same day as the present case.

## POINT II

The opinion of this Court in the instant case No. 28, however, not only does not clarify the law, it further confuses it. It should be modified to bring it into harmony with fundamental principles of the law of negligence and causation.

We respectfully submit that the Court's opinion in this case, particularly when read, as the bench and the bar will read it, in connection with the opinions on the same day in No. 42, *Webb v. Illinois Central Railroad Co.*, in No. 46, *Herdman v. Pennsylvania Railroad Co.*, and in No. 59, *Ferguson v. Moore-McCormack Lines, Inc.*, leaves the law again in utter confusion.

The opinions in Nos. 28, 42, and 59 led Mr. Justice Harlan to say in his dissent, following the language last above quoted from him, "However, in judging these cases, the Court appears to me to have departed from these long-established standards, for as I read these opinions, the implication seems to be that the question, at least as to the element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts. I cannot agree with such a standard, for I consider it a departure from a wise rule of law, not justified either by the provision of the FELA making employers liable for injuries resulting 'in whole or in part' from their negligence, or by



anything else in the Act or its history, which evince no purpose to depart in these respects from common-law rules."

Thus Mr. Justice Harlan puts our criticisms of the Court's opinions in this case, No. 28, and in Nos. 42 and 59, much more effectively than we could have put them ourselves.

It is to be noted that Mr. Justice Reed dissented in this case and in Nos. 42 and 59 and that Mr. Justice Burton did not concur in the language of the opinions in the three cases, limiting his concurrence to the result. Mr. Justice Reed has now retired and his successor has been nominated and confirmed. The personnel of the Court is again undergoing a change. It would seem to be quite appropriate for the Court to grant a rehearing in this case and to reconsider and modify its opinion herein, which has evoked such criticism from members of the Court.

In the opinion in this case, after stating the facts and disapproving one ground upon which the Supreme Court of Missouri had based its opinion and judgment, this Court apparently undertook to make a careful clarification of the law of negligence as it should be applied in cases of this character under the FELA. But, with greatest respect, we submit that it used language which not only did not clarify but, on the contrary, succeeded in more thoroughly confusing the state of this particular branch of federal law than has ever been done before. This Court there said:

"The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the court [below] that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case there was no case for the jury. But that would mean



that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. \* \* \*

That may be exposition in accordance with the old school rhetoric principle of beginning exposition by first stating "what a thing is not." But not only is the whole negative approach here confusing, also the expository second sentence of that quotation is so shot through with negatives piled upon negatives, (negative in "there is no jury question," negative in "although," negative in "unless the judge can say that the jury may exclude" [that is, find a negative], negative in "causes with which the defendant was not connected," negative in "unless his proofs are so strong," negative in "that the jury \* \* \* may exclude a conclusion,") that the reader cannot escape the feeling that the author of the expository passage has actually double-negatived himself into stating the very opposite of what he intended. We could get no meaning whatsoever out of the passage until we had re-read it half a dozen times, and then only a glimmer of meaning. According to our count there are six distinct negatives in the one sentence, which equals three double negatives, or three affirmatives, which we feel sure the author did not intend. Rather we assume that he intended to fortify an ultimate negative assertion in the sentence by multiplying negatives for intensification. However that may be, we

feel certain that the bench and bar of the nation will have great trouble parsing out the meaning of that expository statement.

We are not helped much in our understanding of the Court's meaning when it completes "saying what a thing is not" and takes up the affirmative approach. Thus it is said, "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." That statement takes a simple, statutory positive, "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier," and exalts it into a judicial superlative, "even in the slightest." This inevitably suggests that the Court is changing the settled federal rule that a mere scintilla of evidence will not support a jury verdict,<sup>1</sup> and substituting the old so-called "scintilla rule" which some state courts used to apply to FELA cases until this Court's decisions put a stop to the practice.

That last quoted passage from the opinion is further confused by the citation to it, in footnote 11, of *Coray v. Southern Pacific Co.*, 335 U. S. 520, which was not this kind of case at all but was a case involving alleged violation of a safety appliance act of Congress, a violation of which would impose absolute liability on the violator. No question of negligence of the carrier was involved in that case. It does not improve clarification to cite it here.

Later in the affirmative statement this Court slightly misquoted from the FELA the words "in whole or in part to its [the statutory words are "from the"] negligence" and underscored the words "in part" for emphasis. Then

<sup>1</sup> *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524 (1925); *Western & Atlantic R. Co. v. Hughes*, 278 U. S. 496, 498 (1929); *Brady v. Southern Railway Co.*, 320 U. S. 476, 479 (1943).

the Court again put its superlative gloss on the statutory positive, saying:

"The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. [Citing as "a comprehensive survey of the history of the FELA," Griffith, *The Vindication of a National Public Policy under the Federal Employers' Liability Act*, 18 Law & Contemp. Prob. 160.] The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses, and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. [Citing *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54.] The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, [citing *The Robert Edwards*, 6 Wheat. 187, 190] from which the jury may with reason make that inference."

Obviously this Court could not have intended that last sentence as it actually reads. The obligation of the employer to pay damages does not arise when there is proof, even though entirely circumstantial, from which the jury "may" with reason make that inference. Such obligation arises only if and when the jury, on such reasonable evidence, actually draws that inference and incorporates it into a verdict for plaintiff. There may be other, conflicting evidence, from which the jury may with equal reason draw a contrary inference. The whole passage just above quoted sounds startlingly as if this Court conceives that any jury,

whenever allowed by the trial judge to do so, will inevitably draw the necessary inference to support award of damages in favor of the plaintiff employee and against the defendant employer. That may be true. But it surprises us that this Court should use language suggesting that it is true.

In view of the extent to which Congress has "stripped" defendants in these cases of all common-law defenses, and in view of the fact that there is no legal defense left except the one that the plaintiff has not met his burden of proof, has not adduced sufficient evidence to support a reasonable inference and finding that injury or death resulted "in whole or in part" from the negligence of the defendant, it would seem that this Court ought not to be astute to allow juries to base verdicts for damages on evidence sufficient only to support a mere speculation or conjecture that the defendant was negligent and that the injury or death resulted "in whole or in part" from such negligence.

There was, of course, much metaphysical formalism in the development of the common-law principle of "proximate causation," in the talk about "*causa causans*," "sole, active, efficient, proximate cause," and other like expressions. Unquestionably Congress, by writing the words "in whole or in part" into this statute, made very substantial modifications in the common-law doctrine of proximate causation. One can hardly confine causation to what is "proximate" in the common-law sense when the statute imposes liability for negligence from which the casualty resulted "in whole or in part." But that does not mean that the whole doctrine of "causation" itself is abolished. Negligence from which the casualty did not result in whole or in part cannot be the basis of liability. Evidence upon which a jury cannot reasonably base an inference or finding that carrier negligence caused a casualty at least "in part" cannot lawfully be made the basis of a jury award of dam-



ages under the FELA. And evidence sufficient only to enable a jury to speculate or conjecture as to carrier negligence and as to its causal relation to the casualty, even if only in part, or, as this Court said in this case, even if only "in the slightest" part, ought not to be allowed to support a verdict awarding damages.

As we read its opinion, that is the essential ground of the opinion of the Supreme Court of Missouri in this case. For all the reasons presented by the respondent in its petition for rehearing and brief, we submit that the decision and judgment of this Court in this case authorizes a verdict for damages to stand that is unsupported by evidence sufficient to raise more than a mere speculation or conjecture, not a reasonable inference and finding, of either carrier negligence or that the injury to petitioner resulted from such negligence "in whole or in part." We think that is the principal basis of the dissent of Mr. Justice Harlan and, probably, of the dissent of Mr. Justice Reed as well.

The course of decisions of this Court in these cases, particularly since the 1939 amendment of the FELA became effective, has brought forth strong and sincere protests from distinguished members of this Court. In the case of *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350 (1943), so constantly relied on by plaintiffs in these cases, and here especially relied on by petitioner Rogers, the late Mr. Justice Roberts was impelled to say, at p. 358:

"Finally, I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which



underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence."

On a broader plane, the late Mr. Justice Jackson said in his separate opinion, concurring in the result, in *Brown v. Allen*, 344 U.S. 443 (1953), at p. 535:

"Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."

Again, in the same opinion, he said, at p. 540:

"\* \* \* There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."

Finally, in the same opinion, Mr. Justice Jackson said, speaking from his heart, at p. 546:

"\* \* \* But I know of no way that we can have equal justice under law except we have some law. \* \* \*"

## POINT III

This Court's decision on the same day in No. 42, *Webb v. Illinois Central Railroad Co.*, will be read together with its decision in this case, No. 28, and, so read, it tells the bench, the bar and the public, that juries must be allowed to base verdicts in these FELA cases on speculation and conjecture. The opinions in this case and in No. 42 should be revised so as to eliminate that holding.

We had hoped that this Court's decision in *Lavender v. Kurn*, 327 U. S. 645 (1946), in which a majority of this Court as then constituted expressly authorized juries in these FELA cases to base verdicts for plaintiffs on pure speculation and conjecture, had been tacitly allowed quietly and gracefully to repose in the limbo of unfortunate decisions which had best be forgotten. Recovery of verdict for damages in that case itself was affirmed on the basis of purely speculative and conjectural evidence. Mr. Justice Murphy, who wrote the opinion for this Court himself expressly indulged in pure speculation and conjecture in his opinion.

For a full analysis of that case, see Alderman, *What the New Supreme Court Has Done to the Old Law of Negligence*, 18 Law & Contemp. Prob. 110-159, at 133-138. Since Mr. Justice Frankfurter, in his dissent in Nos. 28, 42, 46 and 59, cites his own book, perhaps the author of this brief may be forgiven for citing his own law review article, in spite of its perhaps irreverent, but certainly not irrelevant, title. It was one of only two articles written from the railroad-employer viewpoint in that most complete symposium on the FELA ever published. The other paper therein written from the railroad viewpoint, was Gibson, *The Venue Clause and Transportation of Lawsuits*, *ibid.*, pp. 367-431.

The *Lavender* case produced an extraordinary reaction among the lower federal courts, which have the primary re-

sponsibility for the administration of FELA. See the comments by Circuit Judge Major in *Griswold v. Gardner*, 155 F. 2d 333-334 (7th Ct. 1946), decided less than two months after this Court decided *Lavender*.

We had hoped that *Lavender* had been stored in a chest with "old lace." But in this Court's opinion in No. 42, *Webb*, in footnote 6, *Lavender* is brought forth and re-vivified and juries are again expressly authorized to base verdicts for plaintiffs on speculation and conjecture. It is rather unusual for this Court to make such a far-reaching holding and re-affirmance in a footnote. Footnotes are helpful devices when properly employed, but we submit that they are not the proper medium for holdings which revolutionize long-settled and fundamental principles of law. We earnestly urge the Court to modify the opinions both in this case and in No. 42, which are inseparable and contemporaneous declarations on the same narrow body of law, and eliminate the authorization to juries to base verdicts for plaintiffs in these cases on mere speculation and conjecture. Unless that is done, the FELA becomes in deed and truth a statute favoring railroad employees with the advantages of the compensation principle of damages without fault of the employer, and based on the fact of injury alone, but not granting to the paying-employers the corresponding right not to have to face juries—with the "sky the limit" or, at least, the vicarious generosity of trial judges the only limit, on the amount of awards. This violates the whole philosophy of workmen's compensation acts.

## POINT IV

We submit that the course of this Court's FELA decisions since *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943) has undermined all the "smallest part" of the law of negligence left in the statute by Congress and that that course should be checked now, at this Term, so as at least to leave in life the principles (1) that jury verdicts in these cases may not be supported upon a mere scintilla of evidence, and (2) that juries may not be allowed to base verdicts for plaintiffs in these cases on pure speculation and conjecture, either as to railroad negligence or as to causal relation between such negligence and the injury to or death of an employee.

2 Under this head we shall be as concise as humanly possible. We again cite the above-cited article in 18 Law and Contemp. Prob. 110-159, which contains a comprehensive review and analysis of every FELA decision by this Court from *Brady v. Southern Railway Co.*, 320 U. S. 476 (1943), to and including *Stone v. New York, C. & St. L. R. R.*, 344 U. S. 407 (1953). We also attach as an appendix to this brief a short summary of the decisions by this Court in FELA cases since *Stone, supra*.

## III

## CONCLUSION

Our conclusion is a restatement of our Point IV, *supra*, which we request the Court to consider here as if repeated verbatim.

We further respectfully submit that the decision of this Court in this case is in conflict with the decisions by this Court in the following cases:

*Brady v. Southern Railway Co.*, 320 U.S. 476 (1943);  
*Eckenrode v. Pennsylvania R.R.Co.*, 335 U.S. 329 (1948);

*Reynolds v. Atlantic Coast Line R.R.Co.*, 336 U.S. 207 (1949);

*Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573 (1951).

Respectfully submitted,

SIDNEY S. ALDERMAN,  
*Counsel for The Association of  
American Railroads, Amicus  
Curiae.*

*Of Counsel:*

FRANCIS M. SHEA,  
SHEA, GREENMAN, GARDNER & McCONNAUGHEY.



## APPENDIX

Cases under FELA decided by this Court since  
*Stone v. New York C. & St. L. R. Co.*, 344 U.S. 407 (1953)

### 1953 TERM

No Cases

### 1954 TERM

*Smalls v. Atlantic Coast Line R.R. Co.*, 348 U.S. 946 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justices Reed, Burton & Minton dissented. The facts are taken from the opinion of the Court of Appeals, 216 F. 2d 842 (C.A. 4, 1954).

The plaintiffs were standing at a railroad crossing waiting to be picked up by one of the railroad's trains for transportation to a safety meeting sponsored by the railroad. Attendance at the meeting was voluntary, but encouraged. While waiting for the train, plaintiffs were struck by an automobile driven by a person having no connection with the defendant railroad. The plaintiffs contended that the railroad had not provided them with a safe place to work in that the crossing was not lighted. A judgment for plaintiffs on a jury verdict was reversed by the Court of Appeals, on the ground that there was no evidence that the defendant was negligent. The plaintiffs were neither invited nor ordered to stand at the crossing, and a station, apparently lighted, was only some 200 yards away.

*O'Neill v. Baltimore & Ohio R. Co.*, 348 U.S. 956 (1955)

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. There were no dissents. The facts are taken from the opinion of the Court of Appeals, 211 F.2d 190 (C.A. 6, 1954).

The plaintiff, a boilermaker, was installing a heavy steel ash pan with the assistance of another employee. While

the pan was being lifted into position, a new bolt broke causing the pan to fall on plaintiff who was standing below guiding the pan into position. The bolt had been selected by plaintiff from defendant's stores and had been used to attach a chain to the pan for lifting purposes. The type of bolt and method of lifting had been used many times before. No evidence was introduced as to what caused the bolt to break. The case was submitted to the jury on the theory of *res ipsa loquitur*, and the trial court entered a judgment on the jury verdict for plaintiff. The Court of Appeals reversed, one judge dissenting, holding that the inference of negligence arising under the *res ipsa* doctrine was rebutted by the evidence that the bolt was new and that defendant had purchased it from a manufacturer without any knowledge of a defect. A new trial was ordered. The Supreme Court ordered the judgment of the trial court reinstated.

#### 1955 TERM

*Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955)

The Supreme Court reversed the decision of the Court of Appeals below in a short *per curiam* opinion. There were no dissents. The facts are taken from the opinion of the Court of Appeals, 216 F. 2d 772 (C.A. 4, 1954).

The employee had been killed by what the jury found and the lower courts affirmed to be defendant's negligence. The jury returned a verdict of \$60,000 in damages, and the trial judge ordered the verdict set aside unless a remittitur of \$10,000 was made. This was done and a judgment for \$50,000 in damages entered. The employee was 22 at the time he was killed, and was survived by his father, 60, and his mother, 47. At the most, about a quarter of his salary—which averaged \$2,200 over a three-year period—had been contributed to his parents. His mother testified that she expected the deceased to have contributed about \$2,500 a year to his parents after four or five years. The Court of Appeals held that this testimony was too improbable to be given credence in view of the contributions of the deceased in the past and his expected future salary allowing for expected increases.

Even with the benefit of all doubts, damages of more than \$39,000 could not properly be awarded. A new trial on the issue of damages was awarded. The Supreme Court granted certiorari to consider whether the Court of Appeals had jurisdiction to review the action of the District Court. Without reaching the jurisdictional question, and to avoid a constitutional question, the Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial court, since "the action of the trial court was not without support in the record." No indication was given in the opinion as to the nature of that support.

*Schulz v. Pennsylvania R. Co.*, 350 U. S. 523 (1956)

This was a Jones Act case. An employee of the railroad was drowned while working as a tug fireman. Four of the defendant's tugboats were locked side by side. Three of the boats were unlighted and dark, and the fourth was only partially illuminated by a spotlight on the pier. The temperature was below freezing and there was some ice on the boats. The deceased had been assigned to work on all four boats because the defendant did not have enough workers on hand properly to perform the duties assigned the deceased. There was no witness to the drowning. When the body was recovered, it was only partially clothed and a flashlight was clutched in one of its hands. When last seen, the deceased had been going to a cabin on one of the boats to change his clothes and the clothes he had been wearing were found in the cabin. A jury verdict for the plaintiff was set aside by the trial judge on the ground that there was no evidence to show that defendant's negligence was the proximate cause of the accident. The Court of Appeals affirmed, but the Supreme Court reversed and reinstated the verdict. The Court held that although there was evidence supporting inferences to the contrary, the evidence was also sufficient to support an inference that the plaintiff slipped on the ice and fell overboard while groping around in the dark with the aid of only a flashlight and that it is the duty of the jury to choose between conflicting inferences, which it may do even if it has to rely on speculation. Justices Reed, Burton, and Minton dissented, and Justice Frankfurter

would have dismissed the writ of certiorari as improvidently granted.

*Anderson v. Atlantic Coast Line R. Co.*, 350 U. S. 807 (1955)

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justices Reed, Frankfurter, Burton, and Harlan dissented on the ground that certiorari should not have been granted. The facts are taken from the opinion of the Court of Appeals, 221 F. 2d 548 (C.A. 5, 1955).

A conductor was killed while directing a switching operation. A refrigerator car was being moved by attaching it to an engine with a 14 foot chain and "jerking" it. This was a usual practice. While attempting to detach the chain, which he approached from the wrong side, the deceased was caught in it and crushed to death when the car continued rolling. The only eyewitness was the engineer, who testified that he could not have handled the engine so as to avoid the accident. The principal claim of negligence apparently was grounded on the failure of the engineer to warn the conductor of his danger by blowing the engine's whistle. A judgment on a jury verdict for the plaintiff was reversed by the Court of Appeals, which held that the engineer had no duty to blow the whistle and warn the deceased. The deceased was in charge of the operation, was an experienced employee, and seemed to be performing a usual function in a usual manner. The Supreme Court reinstated the judgment entered by the trial court.

*Strickland v. Seaboard Air Line R. Co.*, 350 U. S. 893 (1955)

The Supreme Court in a *per curiam* opinion reversed a decision of the Supreme Court of Florida, citing *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350. There were no dissents. The facts are taken from the opinion of the Florida Supreme Court, 80 So. 2d 914 (1955).

The plaintiff was changing an outside brake beam, weighing 118 pounds, on a pullman car, with the assistance of three others. This was being done over a flat roadbed, where the car had broken down. The roadbed was filled with sand



and gravel, as usual. It was necessary for the plaintiff to work in a stooped or squatting position, and the work was done at night with the aid of a flashlight and a carbide light. This was the usual lighting, but an electric light on a drop cord was available. The plaintiff had requested the use of the electric light, but it was not furnished until after the accident. The plaintiff slipped and fell against a switch box. He testified that he did not know what caused him to slip. A track over a pit was nearby and available. This would have enabled the plaintiff to stand and to have the assistance of another for the inside work, and was safer than working over the flat track. The customary practice of the defendant railroad was to do the work over the flat track, although other railroads used a pit when convenient. A judgment for plaintiff on a jury verdict was reversed by the Florida Supreme Court. It held that the defendant had not negligently failed to supply plaintiff with a safe place to work, as alleged. While using the track over the pit was safer, there was no evidence that using the track over a flat roadbed was not safe also and defendant was not required to change its usual practice when not unsafe in itself. The Supreme Court ordered the judgment in the trial court reinstated.

*Cahill v. New York, New Haven & Hartford R. Co.*, 350 U.S. 899 (1955)

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justice Reed dissented, and Justices Frankfurter, Burton, Harlan, and Reed would have denied certiorari. The facts are taken from the opinion of the Court of Appeals, 224 F. 2d 637 (C.A. 2, 1955).

The plaintiff was a brakeman assigned to flag eastbound motor traffic at a junction. He had never done such work before, and was warned to be careful. While doing this work, the plaintiff turned his back on the traffic to look around at a car on a train stalled at the junction. At that moment, a stopped truck started up and struck plaintiff before he could get out of the way. The Court of Appeals reversed a judgment or a jury verdict for plaintiff. With



regard to plaintiff's contention that the defendant was negligent in not providing him with a safe place to work, the Court of Appeals held that according to the evidence the plaintiff had been stationed at the safest spot, although it admittedly and necessarily involved some danger. The Court of Appeals also held that the defendant was not negligent in failing properly to instruct the plaintiff, since no conceivable instructions could have guarded the plaintiff against the negligence of the truck driver. A dissenting judge contended that the defendant was negligent in failing to instruct the plaintiff, new at the particular job, not to turn his back on the motor traffic. If the plaintiff had been facing the traffic, he would have seen the truck start up in time to jump out of the way.

The Supreme Court ordered the judgment of the trial court reinstated. Its mandate was subsequently modified to remand the case to the Court of Appeals for consideration of a matter not previously passed upon. This dealt with the admissibility of evidence of prior accidents at the junction. 351 U.S. 183 (1956).

(4473-5)

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**JOHN T. FOX, Clerk**

**IN THE**  
**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1956.**

**No. 28.**

**JAMES C. ROGERS,**  
**Petitioner,**

**vs.**

**MISSOURI PACIFIC RAILROAD COMPANY,**  
**a Corporation,**  
**Respondent.**

**On Petition for a Writ of Certiorari to the United States**  
**Circuit Court of Appeals for the Eighth Circuit.**

**PETITION FOR REHEARING**  
**and**  
**SUGGESTIONS IN SUPPORT OF**  
**PETITION FOR REHEARING.**

**RUSSELL L. DEARMONT,**  
**GEORGE W. HOLMES,**  
**HAROLD L. HARVEY, and**  
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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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Circuit Court of Appeals for the Eighth Circuit.

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**PETITION FOR REHEARING.**

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Comes now the Respondent and respectfully moves the  
Court to order a rehearing of the above cause.

**GROUND.**

1. In holding that a jury question was made by the testimony of Petitioner that the burning of weeds and vegetation was ordinarily done with a flame thrower, the Court

has ignored the evidentiary rule that a verdict must be based on evidence of probative value. Petitioner's own testimony and all of the testimony in the case shows that the work he was performing was not "ordinarily done" with a flame thrower.

2. The Court's opinion abrogates proximate causation in cases arising under the Federal Employers' Liability Act.

The Court's present ruling, that a railroad is liable if its negligence played "even the slightest part" in an employee's injury, should be re-examined by the Court to determine whether such a departure from the long standing fundamental concepts of negligence and proximate cause ignores the statutory requirement that the injury must result from an employer's negligence.

**Certificate.**

I certify that this Petition is presented in good faith and not for delay.

Don B. Sommers.

## **SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.**

1. The Court has ruled that a jury question of negligence was raised, and has based its ruling upon Petitioner's testimony on direct examination that the burning off of weeds and vegetation was ordinarily done with a flame throwing machine. We submit that the Court, in so holding, not only has ignored the significance of Respondent's testimony that the use of a flame throwing machine was discontinued because of the dangers attendant thereon (R. 68, 69), but has also ignored Petitioner's own testimony on cross-examination. He said on cross-examination that he knew nothing about the operation of the machine, but had only seen it pass through town long before he went to work on the railroad, and he admitted that it was not in use at the time he worked on the railroad and that it was only used to burn the entire right of way, which was not the work he was performing on the day of the accident (R. 27, 28). In ruling that such testimony raises a submissible issue of negligence the Court seems to hold that a person who merely sees a machine being used on one occasion is qualified to give evidence of probative value on which the Court can base a finding that such a machine was "ordinarily" used for a particular purpose. The effect of the Court's ruling in this respect, and its similar rulings in *Webb v. Illinois Central Railroad Company* and *Ferguson v. Moore-McCormack Lines, Inc.*, decided the same day as this case, is to allow juries to determine proper methods of railroad maintenance without any evidence as to the availability or feasibility, or even the safety, of such methods. We earnestly urge that this issue be reconsidered.

2. Heretofore, this Court has held that the 1939 Amendment to the Federal Employers' Liability Act<sup>1</sup> abolished

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<sup>1</sup> 53 Stat. 1404, 45 U. S. C. A. 54.



assumption of risk and contributory negligence as absolute defenses to negligence actions brought under the Act. The foundation of the carrier's liability—negligence—was left intact. The Court to date, has held that the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury remained.<sup>2</sup> Liability was stated to be determined by the general rule, which defines negligence as lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done.<sup>3</sup>

It was also said that for negligence to be actionable it must be the proximate cause of injury. Proximate cause is defined as a direct efficient producing cause from which injury can reasonably be foreseen or expected.<sup>4</sup> It does not mean "sole cause" for there may be more than one producing cause. But it must be a cause without which the injury would not have occurred.

The opinion of the Court in this case completely changes these fundamental concepts and in effect discards the entire theory of proximate cause. The Court now says that if the employer's negligence played *any part, even the slightest*, in producing the injury, there is liability. The Court also says that "it was an irrelevant consideration whether the immediate reason for [Petitioner's] slipping off the culvert was the presence of gravel negligently allowed by the respondent to remain on the surface, or was some cause not identified from the evidence." This language taken literally means that the Court would have sustained lia-

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<sup>2</sup> *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Brady v. Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232.

bility even if the Petitioner's injury was the result of his having been struck by lightning.

In so holding does not the Court ignore the requirement in the statute that the *injury must result from negligence*?<sup>5</sup> For injury to result from negligence, even in part, it must be produced by negligence; it must be caused by negligence. Negligence which results in injury does not merely play a slight part. We submit that so long as the Act provides recovery only for injury *resulting from* the employer's negligence, the common law concepts of negligence and proximate causation remain unchanged. Liability predicated upon negligence playing the slightest part in the injury, is not justified by placing overemphasis upon the "in whole or in part" portion of the statute.

The Missouri Supreme Court in deciding this case adhered to these long-standing common law concepts of negligence which were undeniably stated to be the law by this Court, until the decision in this case. We submit that the persistence of State Supreme Courts and the Circuit Courts of Appeals in adhering to these common law tests of whether the evidence in a particular case raises a question of negligence (want of due care under the circumstances) and of proximate causation (that which is an immediate efficient producing cause of injury) cannot be summarily dismissed as "narrow and niggardly" constructions. Congress has not seen fit to remove these standards of negligence under the Act.

Since the decision in this case will no doubt affect hundreds of cases arising under the Act, and involve enormous sums of money, we earnestly submit that this decision

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<sup>5</sup> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable to any person . . . for such injury or death *resulting in whole or in part from* the negligence of any of the officers, agents or employees of such carrier . . ." (Emphasis added.) 35 Stat. 65, 45 U. S. C. 51.

abrogating the common law concepts of negligence and proximate cause is worthy of reconsideration and we therefore urge the Court to grant a rehearing.

Respectfully submitted,

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